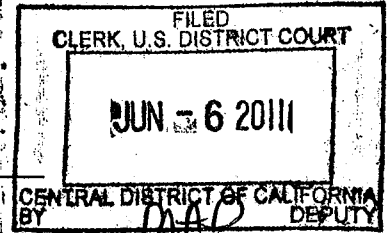


BAP Case No. CC-11-1103  
Bankruptcy Court Case No. 1:11-bk-10426-VK



**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

In re GEORGES MARCIANO,

Involuntary Debtor.

**CV 11-4779** -AHM

GEORGES MARCIANO,  
Appellant/Involuntary Debtor,

vs.

GARY ISKOWITZ, THERESA ISKOWITZ, CAROLYN MALKUS, CAMILLE  
ABAT, MIRIAM CHOI, JOSEPH FAHS, STEVEN CHAPNICK and  
ELIZABETH TAGLE,  
Appellees.

**EMERGENCY MOTION  
FOR STAY PENDING APPEAL OF ORDERS DIRECTING  
APPOINTMENT OF CHAPTER 11 TRUSTEE AND  
APPOINTING CHAPTER 11 TRUSTEE**

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**EMERGENCY MOTION  
FOR STAY PENDING APPEAL OF ORDERS DIRECTING  
APPOINTMENT OF CHAPTER 11 TRUSTEE  
AND APPOINTING CHAPTER 11 TRUSTEE**

**I. INTRODUCTION.**

By this emergency motion, appellant Georges Marciano requests that the Court issue a temporary and a permanent stay pending appeal of the Bankruptcy Court's March 7, 2011 "Order Directing the Appointment of a Chapter 11 Trustee" and its March 11, 2011 "Order Approving Appointment of a Chapter 11 Trustee" by which it appointed David Gottlieb as the Chapter 11 Trustee of Mr. Marciano's Chapter 11 estate (collectively, the "Trustee Orders"). On March 8, 2011, Mr. Marciano filed a notice of appeal from the first order and on March 14, 2011, he filed an amended notice of appeal adding the second order.

A stay of the Trustee Orders is needed to prevent irreparable harm to Mr. Marciano and his Chapter 11 estate resulting from the trustee taking control of Mr. Marciano's assets away from him in a case in which the underlying order for relief is before this Court in an expedited appeal. Mr. Marciano predicted this potential harm when he previously asked this Court for a stay pending appeal. Now it is being incurred, and it should be stopped. It is not enough to say that the creditors "may" be harmed is a stay is not issue.

This appeal is related to Bankruptcy Appellate Panel ("BAP") Case No. 11-1008 (the "First Appeal") in which Mr. Marciano has appealed from the Bankruptcy Court's December 28, 2010 order for relief by which it granted the petitioning creditors' involuntary Chapter 11 petition that was filed on October 27, 2009. Mr. Marciano's motion for a stay pending appeal of that order was denied by the Bankruptcy Court on January 25, 2011. He then filed a similar stay motion with the BAP in the First Appeal on January 27, 2011, which the BAP denied on

February 9, 2011. In denying the motion, the BAP found that he had failed to show irreparable injury if a stay was not issued. It also held: ‘we are concerned that appellees may suffer such harm or prejudice if a stay is entered.’ It did not address Mr. Marciano’s threshold argument that the Bankruptcy Court lost jurisdiction to proceed when Mr. Marciano appealed from the order for relief. However, it ordered that the appeal is “expedited.”

Mr. Marciano appealed the BAP’s denial of his stay motion on February 10, 2011. When it was assigned a case number on February 18, 2011, he immediately filed an emergency stay motion with the Ninth Circuit. The Ninth Circuit denied a stay on February 24, 2011, citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), which stated the factors relevant to a stay pending appeal. In that order, the Court indicated that it “may lack jurisdiction over the appeal because it seeks review of an interlocutory order by the Bankruptcy Appellate Panel.” The Ninth Circuit did not address the threshold argument that the Bankruptcy Court lost jurisdiction to proceed when Mr. Marciano appealed from the order for relief. The Ninth Circuit required Mr. Marciano to file a response showing why the appeal from the BAP’s denial of a stay should not be dismissed due to a lack of appellate jurisdiction. Mr. Marciano filed that response on March 15, 2011, demonstrating that jurisdiction under 28 U.S.C. § 1292 (a)(1).

Faced with the denial by the Bankruptcy Court, the BAP and the Ninth Circuit of a stay pending appeal of the December 28 order for relief, Mr. Marciano had an impossible decision. If he complied with applicable requirements under F.R.B.P. 1007 to file schedules, a statement of financial affairs, etc.; to comply with reporting requirements of the U.S. Trustee; and to appear at a 341(a) meeting to testify as to his financial condition, he would incur irreparable harm to his constitutional privacy rights. If, however, he stood on his privacy rights, he risked the appointment of a trustee, who would take control of his assets – despite the



pending appeal to the BAP from the underlying order for relief and despite the pending state court appeals from the petitioning creditors' default judgments.

Mr. Marciano chose to stand on his privacy rights by not meeting applicable filing requirements. The punishment was swift. Creditors in Mr. Marciano's Chapter 11 case filed a motion for appointment of a Chapter 11 trustee on March 1, 2011. On March 2, the Court set it for hearing on less than 48 hours notice. On March 4, the Court conducted a hearing on that motion. Finding that it had jurisdiction, the Court granted the motion and directed that a Chapter 11 trustee be appointed. The formal order directing the appointment was entered on March 7, 2011. On March 8, 2011, Mr. Marciano filed a notice of appeal to the BAP from that order. On March 10, 2011, Mr. Marciano filed a motion for stay pending appeal of the March 7 order with the Bankruptcy Court, which it denied by order entered without a hearing on March 11, 2011. By that order, it held that Mr. Marciano had not met the requirements for a stay under F.R.B.P. 8005, although it did not explain why. On March 11, 2011, the Bankruptcy Court entered an order appointing the Chapter 11 trustee designated by the Office of United States Trustee. On March 14, Mr. Marciano filed an amended notice of appeal to the BAP, which added that order and the order denying the requested stay.

## **II. THIS COURT HAS JURISDICTION IN THIS APPEAL.**

An order appointing a Chapter 11 trustee is a final order that may be appealed. The Court in *In re Marvel Entertainment Group*, 140 F.3d 463, 470-471 (3d Cir. 1998), explained why:

“Were we not to take jurisdiction at this juncture, no meaningful review of the order appointing a trustee could ever take place, as a practical matter. What we know as men and women we must never forget as judges. Once bankruptcy reorganization has been completed after months or years and after a plan of reorganization has been hammered out, it strains credulity to suggest that a reviewing court would jettison years of bankruptcy infighting, compromise and final

determinations solely for the purpose of reversing the appointment of a trustee and have the proceedings begin again from scratch. The practical reality is that unless an appeal can be lodged now, there will never be a meaningful review of the order appointing a trustee.”

As such, the BAP has jurisdiction over this appeal.

### **III. THE BANKRUPTCY COURT LACKS JURISDICTION.**

A threshold issue is whether the Bankruptcy Court lost jurisdiction due to the appeal. In denying a stay, the Bankruptcy Court held that it had jurisdiction to proceed, but the BAP did not opine on the issue, though it was raised.

First, the continuation of the case will result in irreparable harm to Mr. Marciano, which is a risk of an order for relief that is described in *In re Mason*, 709 F.2d 1313 (9th Cir. 1983), as quoted below. That harm bears upon a stay pending appeal, but it also supports the conclusion that the Bankruptcy Court was divested of jurisdiction to cause such harm after the appeal of the order for relief.

Second, analogous cases demonstrate a loss of jurisdiction. *In re Madill*, 65 B.R. 729, 733 (D. Mont. 1986), the Court explained that the Bankruptcy Court lacked jurisdiction to grant relief from the stay regarding certain property because it “undermined” the appeal affecting the same property. If Mr. Marciano is required to meet applicable requirements, the appeal is undermined because the actions that a trustee takes and the costs incurred cannot be undone.

*Neary v. Padilla (In re Padilla)*, 222 F.3d 1184 (9th Cir. 2000), held that the Bankruptcy Court lacked jurisdiction to enter a discharge order because the debtor’s right to discharge was affected by the pending appeal from a BAP order reinstating a case in that, if dismissal were granted, there could be no discharge. *Id.*, at 1189-1190. An order for relief keeps a debtor in bankruptcy, just as the BAP order did in *Padilla* when it reinstated the petition. Just as the trustee’s appeal in *Padilla* divested the Bankruptcy Court of jurisdiction to “proceed with Padilla’s bankruptcy,” *id.*, at 1189, Mr. Marciano’s appeal from the order for relief

divested the Bankruptcy Court of jurisdiction to proceed with his case.

In *Ginger Root Office Assocs., LLC v. Farmer (In re Advanced Packaging & Prods. Co.)*, 426 B.R. 806, 810-814 (C.D. Cal. 2010), the District Court affirmed the order determining ownership of the alter ego claim, but it held that the Bankruptcy Court lost jurisdiction to approve the sale of that same claim:

“While the Trustee argues that the bankruptcy court had jurisdiction to approve the sale because the transfer did not modify the status quo, the court cannot agree. The proposed sale transferred the alter ego claim that Ginger Root contended it owned to a third party whom the bankruptcy court found to be a good faith purchaser. This foreclosed Ginger Root’s further prosecution of the claim, altered the position of the parties, and expanded the effect of the rights determined in the summary judgment order.” *Id.*, at 827.

Similarly, without a stay, proceedings could not be undone, the “status quo” would be “modified”, and the “position” of the parties would be “altered.”

Third, the creditors’ prior citations on this issue are inapplicable. *In re Focus Media, Inc.*, 378 F.3d 916 (9th Cir. 2004), did not discuss of whether the Bankruptcy Court retained jurisdiction after the appeal from an order for relief. *In re Christian & Porter Aluminum Co.*, 584 F.2d 326, 334 (9th Cir. 1978), characterized an order for relief as an interlocutory order in concluded that appealing the order did not cause a loss of jurisdiction. *Sherman v. SEC (In re Sherman)*, 491 F.3d 948, 967 (9th Cir. 2007), concerned an appeal was from an interlocutory order denying a motion to dismiss, so there was no loss of jurisdiction to enter the debtor’s discharge. In contrast, *Mason* held that an order for relief is a final order, supporting the opposite conclusion that the appeal of the order divests the Bankruptcy Court of jurisdiction.

Fourth, the cases on loss of jurisdiction describe the need to “preserve the status quo,” which the Bankruptcy Court incorrectly viewed as preserving Mr. Marciano’s assets. In *Madill*, the status quo was preserving the debtor’s property;

in *Padilla*, it was preserving the possibility of no discharge; and in *Advanced Packaging*, it was preserving the creditors' alter ego claim – all of which were the status quo before the orders on appeal. The relevant status quo here is the one before the order on appeal, without obligations to file schedules and testify.

Finally, loss of jurisdiction also can be explained in terms of avoiding multiple appeals. Interlocutory orders are not appealable to avoid multiple appeals, *In re Frontier Properties, Inc.* 979 F.2d 1358, 1363-1364 (9th Cir. 1992), but an order for relief is a final order. Concluding that the Bankruptcy Court lost jurisdiction will prevent multiple appeals in the Chapter 11 case, which could be taken from orders entered on the faulty assumption that the Court has jurisdiction.

Given that the Bankruptcy Court lacked jurisdiction to appoint a trustee, but did so anyway, the Trustee Orders must be stayed pending appeal before any further actions occur based upon an incorrect assumption that there is jurisdiction to proceed in the Bankruptcy Court.

#### **IV. A STAY PENDING APPEAL IS REQUIRED.**

##### **A. Applicable Standard.**

This Court's rules describes that a motion for discretionary stay pending appeal must satisfy the requirements described in *In re Wymer*, 5 B.R. 802 (9th Cir. BAP 1980), which explained:

“The discretion of the court is exercised ‘upon such terms as to bond or otherwise as [the court] considers proper for the security of the rights of the adverse party.’ FRCP 62(c). While the power to maintain the status quo pending appeal ‘should always be exercised when any irreparable injury may result from the effect of the decree as rendered’ (*Hovey v. McDonald, supra*, 161), both federal and California Courts hold that ‘. . . this power should be sparingly employed and reserved for the exceptional situation.’ *People v. Emeryville*, 69 Cal. 2d 533, 537, 72 Cal. Rptr. 790, 446 P.2d 790, 793 (1961).

“The accepted standards for discretionary stays are described in

*Schwartz v. Covington*, 341 F.2d 537 (9th Cir 1965):

- '1. Appellant is likely to succeed on the merits of the appeal.
- '2. Appellant will suffer irreparable injury.
- '3. No substantial harm will come to appellee.
- '4. The stay will do no harm to the public interest.'" *Id.*, at 806

These are the same standards followed under F.R.B.P. 8005. *Ohanian v. Irwin (In re Irwin)*, 338 B.R. 839, 843 (E.D. Cal. 2006).

**B. The Standard For A Discretionary Stay Is Met.**

**1. This Appeal Presents Exceptional Circumstances.**

There are important circumstances that make this appeal and this request for a discretionary stay unique: Involuntary cases are relatively rare. Even more rare are cases in which an order for relief is granted and then the order appealed. Even more rare are cases where the involuntary petition is granted solely based upon huge default judgments, which are on appeal. In such exceptional circumstances, a stay pending appeal of the Trustee Orders is particularly appropriate.

Further, the Trustee Orders are based upon the assumption that the order for relief was properly entered, which is at issue in the First Appeal. That assumption is incorrect. In deciding several issues of first impression, the Bankruptcy Court held that there is an irrebuttable presumption that a creditor's claim that is based upon a default judgment may not be in "bona fide dispute" under 11 U.S.C. §§ 303(b)(1) and 303(h)(1). The Bankruptcy Court relied upon a dated decision in *In re Drexler*, 56 B.R. 960 (Bankr. S.D.N.Y. 1986), while ignoring numerous more recent cases to the contrary.<sup>1</sup> Thus, the Chapter 11 case is proceeding and a trustee

<sup>1</sup> See, *Platinum Fin. Servs. Corp. v. Byrd (In re Byrd)*, 357 F.3d 433, 438 (4th Cir. 2004) ["While we recognize the general enforceability of unstayed judgments, see, e. g., *Drexler*, 56 B.R. at 967-68, the text of the Bankruptcy Code establishes no such hard-and-fast rule."]; *In re Soderberg & Schafer CPAS, LLC*, 2010 Bankr. LEXIS 2600, 2010 WL 3155818 (Bankr. N.D. Ohio Aug. 6, 2010) ["The court finds the reasoning in *Byrd* and *In re Henry S. Miller Commercial, LLC*, persuasive. Petitioner presented evidence that he holds an unstayed judgment

has now been appointed, when it is likely that the underlying order for relief will be reversed in the First Appeal in which the Court has ordered that it be expedited.

**2. Mr. Marciano Is Likely To Prevail.**

**a. He Is Likely To Prevail In The First Appeal.**

In bringing his emergency stay motion in the First Appeal, which was filed on January 27, 2011, and in the supporting reply, which was filed on February 9, 2011, Mr. Marciano demonstrated that he was likely to prevail in that appeal, for four reasons: (1) the Bankruptcy Court incorrectly precluded Mr. Marciano from rebutting a presumption that the default judgments held by the petitioning creditors and other creditors were not in bona fide dispute under 11 U.S.C. § 303, as shown by the cases cited above; (2) it improperly denied a motion to suspend the case under 11 U.S.C. § 305(a) based upon issues of first impression; (3) it erroneously denied Mr. Marciano's motion to dismiss the case and to quash service upon him at a residential address where he had not lived for months, especially because he also was not residing in the United States at the time; and (4) it incorrectly precluded all discovery on the bona fide dispute issues the issue of whether the involuntary

against Debtor. While not conclusive of the issue, this evidence creates a rebuttable presumption that his claim is not the subject of a bona fide dispute.]; *In re Starlite Houseboats, Inc.*, 426 B.R. 375, 383 (Bankr. D. Kan. 2010) ["The parties dispute whether the default judgment was entered after effective service, and this Court finds that such dispute is bona fide. Therefore the Court finds that H2O lacks standing to be a petitioning creditor under § 303(b)(1) because there is a bona fide dispute as to liability for the judgment."]; *In re Henry S. Miller Commercial, LLC*, 418 B.R. 912, 921-922 (Bankr. N.D. Tex. 2009) ["If there are objective circumstances that might give rise to a bona fide dispute as to liability or amount (e.g., perhaps a default judgment where facts were not actually litigated; . . . then having an unstayed judgment may not pass muster under Section 303."]; *In re Graber*, 319 B.R. 374, 377-378 (Bankr. E.D. Pa. 2004) ["I am not persuaded that the cases cited by Petitioners for the proposition that an unstayed judgment, even if being challenged by appeal or as here by a motion to open or strike, can never be the subject of a bona fide dispute. (Footnote omitted) Rather the burden then shifts to the Debtor to demonstrate the existence of a bona fide dispute"]; *In re Prisuta*, 121 B.R. 474, 475 (Bankr. W.D. Pa. 1990) ["It is possible, where circumstances so dictate, for there to be a bona fide dispute even when the claim arises from an unstayed, unappealed judgment of record."]



petition had been filed in bad faith, which in turn was based upon the incorrect premise that a petitioning creditor's bad faith may not be considered in granting an involuntary petition, but only may be considered for purposes of awarding damages under 11 U.S.C. § 303(i).

In denying the stay motion on February 9, this Court appeared to accept that Mr. Marciano had demonstrated a likelihood of success, given that its ruling did not specifically mention any failure to show a likelihood of prevailing on the merits. Mr. Marciano will not restate the detailed legal analysis made in emergency stay motion and in the supporting reply filed in the First Appeal. Instead, he incorporates that showing by reference. If the order for relief is likely to be reversed, then the Trustee Orders also are likely to be reversed. That is true for the simple reasons that Mr. Marciano's purported violations of filing requirements under F.R.B.P. 1007 upon entry of the order for relief will not have been a violation if the order for relief is reversed, thereby confirming that he was entitled to stand on his privacy rights until such time, if ever, that an order for relief is properly entered.

**b. Mr. Marciano Is Likely To Prevail On The Issue of Whether A Trustee Is In The "Interests" Of All Parties At This Stage Under 11 U.S.C. §§ 1104(a)(2) and (3).**

The appointment of a trustee was premature, while Mr. Marciano was waiting for a ruling of the BAP in the First Appeal on the order for relief, particularly in light of the lack of any showing that creditors will be harmed without a trustee.

Further, a Chapter 11 trustee is saved for exceptional circumstances, where it is clear that the appointment of the trustee is in the best interests of creditors and the estate. *Adams v. Marwil (In re Bayou Group, LLC)*, 564 F.3d 541, 546 (2d Cir.

2009) [“appointment of a trustee in a Chapter 11 case is an ‘extraordinary’ remedy.”] At hearing on March 4, however, the Bankruptcy Court did not appear to weigh the extraordinary nature of the remedy of a trustee against what a trustee would accomplish, although such a weighing is necessary, as noted by the Court in *Cajun Elec. Power Coop. v. Central La. Elec. Co. (In re Cajun Elec. Power Coop.)*, 69 F.3d 746, 749 (5th Cir. 1995):

“The appointment of a trustee pursuant to Section 1104(a)(1) is an extraordinary remedy, and there is a strong presumption that the debtor should be permitted to remain in possession absent a showing of need for the appointment of a trustee.” [Emphasis added.]

At the March 4 hearing, the Bankruptcy Court relied on 11 U.S.C. § 1104(a)(1) in finding “cause” for the appointment of a trustee, but it did find not “fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor.” Although not specifically articulated, the “cause” was the need to have someone (now a trustee) investigating the “acts, conduct, assets, liabilities, and financial condition of the debtor” under 11 U.S.C. § 1106(a)(3), and filing schedules, a statement of financial affairs, a creditor list and related documents under 11 U.S.C. § 1106(a)(2), since Mr. Marciano had not yet done so. At the request of the U.S. Trustee in its joinder, which the Court declined to strike, the Court also relied upon 11 U.S.C. § 1104(a)(3), which cross-references the grounds for conversion of dismissal under § 1112 and permits the appointment of a trustee if “the court determines that the appointment of a trustee or examiner is in the best interests of creditors and the estate.” Section 1112(b)(4)(F) in turn includes an “unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter.”

In essence, the Court held that if Mr. Marciano was not going to disclose his private financial information until he had a ruling from the BAP in his pending



appeal from the December 28 Orders, it was going to appoint a trustee to see whether the trustee could find that financial information, as if there is an urgent need for it at this point. This determination was incorrect under 11 U.S.C. §§ 1104(a)(2) and (3).

Through counsel, Mr. Marciano asked the Court at the March 4 hearing about the practical consequences of the appointment of a trustee, given that Mr. Marciano is standing on his constitutional right of privacy. Simply stated, how soon -- if ever -- can a trustee assemble the information necessary to ascertain and disclose the detailed aspects of Mr. Marciano's financial condition, if Mr. Marciano does not provide that information to the trustee?

The remedy imposed by the Court is required to be in the "best interests of creditors and the estate" under § 1104(a)(3). Section 1104(a)(2), which the creditors invoked in their motion, similarly applies a standard of "the interests of creditors, any equity security holders, and other interests of the estate," rather than simply focusing on creditors. By the time the expedited appeal to the BAP is over, a trustee cannot reasonably be expected to discover and disclose Mr. Marciano's financial information in fulfilling his or her duties in any reliable manner. How will the "best interests of creditors and the estate" be served by a trustee who will incur great expense and who is likely to have little to show for it, simply because the creditors do not want to wait for the ruling from the BAP?

The point is that the appointment of a trustee at this time is not in the "best interests of creditors and the estate." It will result in huge costs, but to what practical end? When Mr. Marciano first asked the Court at hearing in July 2010 to suspend the case under 11 U.S.C. § 305(a), he predicted that huge expense would be incurred by the creditors and by himself and that significant judicial resources would be spent on the involuntary case, if the Court did not stay the case pending the resolution of the State Court appeals. The Court denied Mr. Marciano's

motion, and huge expenses and judicial resources were incurred.

When the order for relief was entered, Mr. Marciano renewed his motion under § 305(a). Again, he predicted that huge expense and judicial resources would be needlessly incurred, but his renewed motion was denied, and now those expenses and resources are being spent at an alarming rate. However, the rate at which they will be spent will increase exponentially as a trustee, the trustee's counsel, the trustee's accountants and the trustee's investigators commence the fulfillment of their statutory duties. This factor has been emphasized. In *Adams v. Marwil (In re Bayou Group, LLC)*, 564 F.3d 541, 546-547 (2d Cir. 2009), the Court noted:

“In determining whether a § 1104 appointment is warranted or in the best interests of creditors, the bankruptcy court must bear in mind that the appointment of a trustee ‘may impose a substantial financial burden on a hard pressed debtor seeking relief under the Bankruptcy Code,’ by incurring the expenditure of ‘substantial administrative expenses’ caused by further delay in the bankruptcy proceedings. See *Midlantic Nat’l Bank v. Anchorage Boat Sales, Inc. (In re Anchorage Boat Sales, Inc.)*, 4 B.R. 635, 644 (Bankr. S.D.N.Y. 1980).”

The same could be said in this case. The specter of huge expenditures of monies and judicial resources is not overstated.

Finally, the unfortunate fact is that the Court now has placed the trustee and his professionals in an impossible position. What will happen if the BAP reverses the order for relief, thereby mooted the appointment of the Chapter 11 trustee based upon the premises that (1) the order for relief was properly entered; (2) Mr. Marciano should have filed schedules and otherwise comply with applicable debtor in possession requirements; and (3) his failure to do so warranted a trustee? In all likelihood, the trustee will be dismissed at that point. And what will happen if the State Court of Appeals reverses the default judgments of the petitioning creditors and the five other creditors? The bankruptcy should be dismissed at that point.

The Court has placed the trustee and the trustee's professionals in the unfortunate position of having to incur very large fees and expenses, even though there is a possibility (indeed, a probability) that they will never be paid. It must be kept in mind that the petitioning creditors and the other five creditors have never argued that Mr. Marciano will lose the appeals. They never have contradicted his showing in that regard.

In *In re Focus Media, Inc.*, 378 F.3d 916 (9th Cir. 2004), for example, the creditors argued that the debtor's appeal from an order for relief was moot because the effect of the order could not be undone. The Court disagreed, finding that fees paid to the creditors' counsel could be ordered disgorged. *Id.*, at 924. If the trustee and the trustee's professionals have received any monies, that exact same result could occur in this case. But the more likely result will be that such uncertainty will cause them not to be quick to undertake huge expenses that may never be paid. That, of course, means that there will be little beneficial consequence to appointing a trustee at this time and, more importantly, that the appointment will not be in the "best interests of creditors and the estate."

In summary, appointment of a trustee was not in the best interests of the creditors and the estate under 11 U.S.C. §§ 1104(a)(2) and (3). A trustee and the professionals hired by him will be very expensive, if they try to fulfill their statutory duties, and it is highly unlikely the trustee will be able to meet his or her obligations in filing schedules, a statement of financial affairs, a creditor list, etc., especially by the time Mr. Marciano's appeal to the BAP from the order for relief is over. Practically speaking, a trustee will accomplish little, if anything, and a trustee will cause great expenses, that may be entirely unnecessary, and to what end? There has been no showing of an imminent need for Mr. Marciano's financial information.

**c. Mr. Marciano Is Likely To Prevail On Whether  
“Cause” Was Shown Under 11 U.S.C. § 1104(a)(1).**

Section 1104(a)(1) authorizes the appointment of a trustee:

“for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor;....”

The use of the word “including” admittedly means that “dishonesty, incompetence, or gross mismanagement of the affairs of the debtor” is not an exclusive list of what constitutes “cause” under § 1104(a)(1), but it is interpreted keeping in mind that: “[T]he standard for § 1104 appointment is very high.” *Adams v. Marwil (In re Bayou Group, LLC)*, 564 F.3d at 546 [finding that “the U.S. Trustee has not met the ‘very high’ standard for a § 1104 appointment. The U.S. Trustee has not attempted to show that [debtor] has engaged in ‘fraud, dishonesty, incompetence, or gross mismanagement.’”]

Although a flexible concept, the Bankruptcy Court stretched the notion of “cause” way beyond its limits. It must be in the nature of incompetence or dishonesty, but there was no showing of that by the moving parties and no finding of that by the Court on March 4. In affirming the denial of a trustee, the Court in *Schuster v. Dragone*, 266 B.R. 268, 272 (D. Conn. 2001), explained that there must be dishonesty or mismanagement that is more than simple mismanagement:

“Under subsection (1), the Bankruptcy Court’s discretion is limited to a determination of whether ‘cause’ exists for such appointment, and such ‘cause’ must be in the nature of ‘fraud, dishonesty, incompetence, or gross mismanagement’ of the debtor by current management, either before or after the commencement of the case. ‘The concepts of incompetence and dishonesty cover a wide spectrum of conduct and . . . the court has broad discretion in applying such concepts to show cause.’ *Dalkon Shield Claimants*, 828 F.2d at 241.

Implicit in a finding of fraud, incompetence, or dishonesty, for purposes of subsection (1) is whether the evidence of the misconduct rises to a level sufficient to warrant the appointment of a trustee. *In re General Oil Distribs.*, 42 B.R. at 408-09. Moreover, 'since one would expect to find some degree of incompetence or mismanagement in most businesses which have been forced to seek the protection of chapter 11, the Court must find something more aggravated than simple mismanagement in order to appoint a trustee.' *In re Clinton Centrifuge*, 85 B.R. at 983-84; *In re Anchorage Boat Sales, Inc.*, 4 B.R. 635, 644-45 (Bankr. E.D.N.Y. 1980).” [Emphasis added.]

The mere failure to file financial information and make financial disclosures is not “in the nature of ‘fraud, dishonesty, incompetence, or gross mismanagement’ of the debtor by current management.” As such, the Bankruptcy Court improperly decided at hearing on March 4 that there was cause for appointment of a trustee. See also, *Altman v. Rafael Galleries, Inc. (In re Altman)*, 2000 U.S. Dist. LEXIS 16235, \*17-18 (D. Conn. July 27, 2000) [“the examples of conduct following the word ‘including’ do not constitute the entire catalogue of ‘good cause,’ but rather are only illustrative of what type of conduct may constitute cause warranting appointment of a trustee.” (Emphasis added).]

The notion of “cause” requires much more than simply examining the debtor’s behavior. It also necessarily requires the Court to look at the “big picture,” including what a trustee will cost and accomplish. Those factors are discussed above under 11 U.S.C. §§ 1104(a)(2) and (3), but they also must be considered under 11 U.S.C. § 1104(a)(1), as described by the Court in *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 577 (3d Cir. 2003), which rejected the appointment of a trustee under § 1104(a)(1) because “appointing a trustee is too drastic a step,” and which explained that the expense and delay of a trustee warranted that conclusion:

“The problem is that appointing a trustee amounts to replacing much of a debtor’s high-level management, and that creates immense costs

in two ways. First, there is a statutory fee (which can be substantial) to which trustees are entitled for their services. See 11 U.S.C. §§ 326(a) (setting forth fee schedule), 330(a) (setting forth trustee's right to compensation); cf. 11 U.S.C. § 1107(a) (providing that debtors-in-possession are not entitled to statutory trustee's fees). [Footnote omitted.] More important, however, is the cost implicit in replacing current management with a team that is less familiar with the debtor specifically and its market generally. . . . See Kenneth N. Klee & K. John Shaffer, *Creditors Committees Under Chapter 11 of the Bankruptcy Code*, 44 S.C. L. Rev. 995, 1045, 1049 (1993) (observing generally that 'the incremental costs' of a trustee usually 'outweigh[] the benefits,' and that 'maximization of value rarely lies down this path.')” [Emphasis added.]

It is not surprising that the cost and delay of a trustee is an important consideration in assessing the “interests” of all concerned parties, as well as in finding “cause” for appointment of a trustee. This is a factor that the Bankruptcy Court did not account for at the March 4 hearing.

The cases cited by the moving creditors in their motion for appointment of a trustee were instructive on the issue of whether the non-filing of schedules and reports constituted “cause” to appoint a trustee because they showed two things: (1) that a trustee may be appointed after a relatively long period of misconduct; and (2) much more than a mere short-term lack of financial disclosure is required for a trustee to be appointed, and there must be dishonesty or incompetence “in the nature of ‘fraud, dishonesty, incompetence, or gross mismanagement’ of the debtor by current management.” *Schuster v. Dragone*, 266 B.R. at 272. See, *In re Cohoes Industrial Terminal, Inc.*, 65 B.R. 918, 919-921 (Bankr. S.D.N.Y. 1986) [5 months since case filing accompanied by “no real progress in this case”; “[t]he debtor has been operating without fire or liability insurance for the last 9 months”; “the debtor has not paid post-petition rent or mortgage charges”; and “[t]he conflicts of interest in this case abound.”]; *In re V. Savino Oil & Heating Co.*, 99 B.R. 518, 522 (Bankr. E.D.N.Y. 1989) [1 year from filing accompanied by the



nondisclosure and “affirmative efforts to misrepresent or conceal such important matters” and post-petition transfers by the debtor without court approval under 11 U.S.C. § 363(b)]; *In re Paolino*, 60 B.R. 828, 829 (E.D. Pa. 1986) and *In re Paolino*, 53 B.R. 399, 400 (Bankr. E.D. Pa. 1985) [4 months since case filing accompanied by pre-petition criminal check-kiting scheme for a half a million dollars]; *In re Ford*, 36 B.R. 501, 502 (Bankr. W.D. Ky. 1983) [9 months since case filing accompanied by two pre-petition judgments finding fraud by the debtor, plus “[f]ailure to obtain permission for the transfer of estate assets,” “[f]ailure to obtain Court permission prior to making interest-free loans from estate assets to a wholly-owned, nonparty corporation,” “[f]ailure to recognize a duty to keep estate assets separate from assets of a corporation not subject to this Court’s jurisdiction,” and “[u]se of transferred assets as his own to the detriment of his personal creditors.”]; and *In re Horn & Hardart Baking Co.*, 22 B.R. 668, 669 (Bankr. E.D. Pa. 1982) [1 year since filing the case accompanied by “an unexplained loss in the amount of \$127,321.00”; “the debtor has mishandled several transactions concerning the lease agreements”; “monthly operating statements which have been filed reflect a continuing operating loss”; and “the Court finds that the debtor is being mismanaged.”]

In contrast, in this case the only showing made by the moving parties was a short-term failure to file schedules, the statement of financial affairs, and related documents and to comply with reporting requirements to the U.S. Trustee. As a matter of law, that alone was insufficient to warrant the appointment of a trustee.

### **3. Mr. Marciano Will Suffer Irreparable Injury.**

The very same factors that stand for the proposition that an order for relief in an involuntary bankruptcy is an appealable order, also require the conclusion that irreparable harm will occur to Mr. Marciano if a stay pending appeal is not immediately issued. As noted by the Ninth Circuit in *In re Mason*, 709 F.2d 1313,

1316, 1317 (9th Cir. 1983):

“[W]e are convinced that orders for relief should be considered final for purposes of appeal because they ‘may determine and seriously affect substantive rights’ and ‘cause irreparable harm to the losing party if he had to wait to appeal to the end of the bankruptcy case.’” . . . [¶] An order for relief, being a conclusive determination of the debtor’s status as bankrupt, carries with it a great potential for irreparable injury if immediate appeal is not allowed. An order for relief effectively divests the debtor of his assets, creating an estate controlled by the bankruptcy court. [Citation omitted] . . . . During the administration of the estate the debtor’s rights are limited. On entry of the order for relief he loses control of his assets, which may include a business. See 11 U.S.C. § 303(f). Once property of the estate is liquidated there appears to be no way the debtor can force bona fide purchasers to return the assets. [Citations omitted]” [Emphasis added.]

*Mason* suggests what could be irreparable harm. With the appointment of a trustee, it has come to pass. Mr. Marciano will be divested of his assets, which belong to his estate under 11 U.S.C. § 541 and which will be under the control of a trustee Court absent a stay pending appeal. Further, “[d]uring the administration of the estate,” Mr. Marciano’s rights will be “limited” and “he loses control of his assets.” This irreparable injury must be stopped.

Further, as explained by the Court in *Zamora v. Virtue (In re Cont’l Coin Corp.)*, 2009 U.S. Dist. LEXIS 74392, \*29 (C.D. Cal. Aug. 21, 2009), potential litigation costs also are a consideration in granting a stay pending appeal:

“[The Bankruptcy Court] also found that, without a stay, the Trustee would be harmed by the cost of litigating claims that may turn out to be non-cognizable as a matter of law. (ER 3063.) While litigation costs may not constitute irreparable harm, *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24, 94 S. Ct. 1028, 1040, 39 L. Ed. 2d 123 (1974), the bankruptcy court found that allowing Virtue’s case to proceed would alter the status quo and harm administration of the bankruptcy case. (ER 3063.) Moreover, the litigation costs would not be borne by the Trustee alone, but would also lead to diminution of the estate and adversely affect distribution to other creditors. (ER



3063.). . . The Court concludes that a ‘reasonable man [c]ould take the view adopted by the [bankruptcy court].’ *In re Irwin*, 338 B.R. at 844. Therefore, the bankruptcy court did not abuse its discretion in issuing the stay.” [Emphasis added.]

The same reasoning applies in this case. Like the trustee in *Continental Coin*, Mr. Marciano will have considerable expense in proceeding with the Chapter 11 case, which could be avoided if a stay is issued and the appellate court subsequently rules in favor of the appellant, who is Mr. Marciano in this case. Similarly, there will be cost to the “estate.” Even if the BAP decides that the involuntary stay should not have been granted under § 303 and/or a stay of the case should have issued under § 305(a)(1), the cost to Mr. Marciano will deplete his assets, *i.e.*, his “estate,” even if the bankruptcy is dismissed.

#### **4. No Anticipated Substantial Harm To Appellees.**

It must be kept in mind under *In re Wymer* that the requirement is that “[n]o substantial harm will come to appellee.” It is not enough that the harm be less than substantial. More importantly, it is not enough that substantial harm “may” come.

The appellees from the order appointing the trustee are creditors, and perhaps the U.S. Trustee. The creditors have succeeded in what they set out to do. An order for relief has been entered. Potential avoidance claims have been preserved, as has Mr. Marciano’s estate. The “race to the court house” by the judgment creditors pursuing Mr. Marciano’s assets has been prevented. A stay of the Chapter 11 case at this point will not cause any material harm, much less any “substantial harm,” to the petitioning creditors because they have met their goals.

The petitioning creditors have speculated many times that Mr. Marciano might be doing something to render his assets unavailable. They imagine that his move to Canada in August 2009 must be improperly motivated. Yet, although it has been more than 16 months since petitioning creditors filed this case, they have failed to offer a shred of evidence to support their bare speculation. They

undoubtedly will argue that “substantial harm will come” to the petitioning creditors if a stay pending appeal is issued, but they have never offered any evidence to support a finding that the harm “will come,” which is the standard. Instead, their speculation is that some sort of harm “might come,” which does not satisfy the third criteria. And they certainly have not shown any evidence that suggests that “substantial harm” will come from a stay. Mr. Marciano is aware of no harm that will come to the petitioning creditors from a stay pending appeal.

Indeed, the inadmissible evidence submitted by the petitioning creditors in joining the motion for appointment of a trustee showed to the contrary. [Dkt. no. 219.] It showed that Mr. Marciano has not transferred the three real properties in Los Angeles that the petitioning creditors claim he owns through limited liability companies; that he has clearly disclosed his affiliations with Canadian entities that the petitioning creditors claim acquired properties in Montreal; and that he has hidden nothing about those transactions.

##### **5. No Harm To The Public Interest.**

The cases discussing a stay under Rule 8005 often do not get to the last factor to discuss what “public interest” could be harmed by a stay pending appeal because appellants already have failed to satisfy one or more of the first three factors. Several recent cases are instructive in demonstrating that the “public interest” would be promoted by a stay, as opposed to being “harmed.”

First, the Court in *SS Farms, LLC v. Sharp (In re SK Foods, L.P.)*, 2010 U.S. Dist. LEXIS 46920 (E.D. Cal. May 11, 2010), addressed public interest in terms of preserving the purpose of the appeal. In that case, the appellants requested “a stay of the Bankruptcy Court’s Order which gave Bankruptcy Trustee Bradley D. Sharp (‘Trustee’) the authorization to continue to possess and review information in his possession relating to the moving party farming entities.” *Id.*, at \*2. On appeal, the District Court issued a stay pending appeal. In discussing the fourth factor, it

stated: “the public interest is served in preserving the integrity of the right to appellate review since that right may be undermined if a stay is not forthcoming.”

\* 12. The same reasoning applies here. If the trustee is allowed to proceed, what occurs can never be undone should the appellate court decide that the involuntary petition should not have been granted under 11 U.S.C. § 303(h) and/or that a stay of the involuntary case should have been issued under § 305(a).

Second, in *Zamora v. Virtue (In re Cont'l Coin Corp.)*, 2009 U.S. Dist. LEXIS 74392, \*30 (C.D. Cal. Aug. 21, 2009), the Court addressed public interest in terms of avoiding unnecessary costs: “the bankruptcy court found that a stay was in the public interest because ‘going forward with the merits of the case while an appeal is pending on the very question of what is actionable . . . would be a serious waste of time, money, and judicial resources.’” As explained above, the same is true in this case.

Third, in *New Cingular Servs. v. Burkart (In re Wire Comm Wireless, Inc.)*, 2008 U.S. Dist. LEXIS 58563, at \*16 (E.D. Cal. Aug. 1, 2008), the Court focused on the impact on judicial resources: “Staying a potentially unnecessary adversary action in a bankruptcy court conserves judicial resources.” The same is true here. The burden of Mr. Marciano’s involuntary Chapter 11 case already has been significant to this Court. In the absence of a stay, the case will continue to demand the use of judicial resources at a time when the Court’s load is heavy.

Fourth, the comments of Senator Baucus quoted in the Bankruptcy Court’s December 28 Memorandum in support of the order for relief explain the policy of preventing the “stigma and expense” of an involuntary bankruptcy. [148 Cong. Rec. S.11,728 (daily ed., November 20, 2002).] That policy would be promoted by a stay of the order for relief pending appeal, given that without a stay the stigma and expense to Mr. Marciano resulting from him being unwillingly forced into bankruptcy and then having a trustee appointed will be inflicted upon him.

Mr. Marciano acknowledges that there is a competing public interest in terms of the efficient resolution of bankruptcy proceedings and the preservation of estate assets. Courts typically throw in a statement to that effect to bolster their decision to deny a stay pending appeal, as opposed to that public interest being a determinative factor. Moreover, that interest is less relevant or not relevant in this case for at least three reasons. First, the evidence does not suggest that this interest is implicated. Again, the petitioning creditors have speculated that a trustee is necessary because Mr. Marciano might be concealing assets, but they have never offered any evidence in that regard, which is to say that there is no evidence to suggest that there is any need for a trustee. Second, as described above, the Court in *Continental Coin* noted that the goal of a matter expeditiously proceeding on its merits was outweighed by the competing interests of precluding unnecessary expense when there is an “unsettled” issue of law at stake. In this case, the issues on appeal could not be more “unsettled” in the Ninth Circuit. Accord, *Haskell v. Goldman, Sachs & Co. (In re Genesis Health Ventures, Inc.)*, 367 B.R. 516, 522 (Bankr. D. Del. 2007) [“While it is clearly not in the public interest to have cases languishing on court dockets for long periods of time, it is also not preferable to compel parties to go through the expense of preparing a case for trial when all of that preparation could be rendered moot by a reversal on an interlocutory appeal.”] Third, the interest of efficient resolution of bankruptcy proceedings and the preservation of estate assets is only one among many competing public interests, most of which favor a stay.

#### V. CONCLUSION.

On March 8, 2011, Mr. Marciano filed the appeal from the Bankruptcy Court’s March 7 order directing the appointment of a trustee, and the appeal was referred to the BAP on March 11, 2011. The appeal was assigned a case number and docketed by the BAP on March 21, 2011. Mr. Marciano has promptly filed

this motion seeking emergency relief in order to prevent irreparable harm that is already occurring as a result of the appointment of a Chapter 11 trustee. Based upon the foregoing, Mr. Marciano respectfully requests that the Court issue a permanent stay of the Trustee Orders pending resolution of this appeal and, in the interim, that the Court immediately issue a temporary stay pending appeal until the issue of whether a permanent stay should be issued is determined.

DATED: March 21, 2011

HILL, FARRER & BURRILL LLP

By: /s/ Daniel J. McCarthy

Daniel J. McCarthy  
Attorneys for Appellant/Involuntary  
Debtor GEORGES MARCIANO

## **CERTIFICATE OF SERVICE**

I hereby certify that on March 21, 2011, I electronically filed the foregoing document with the Clerk of the Court for the Bankruptcy Appellate Panel for the Ninth Circuit by using the CM/ECF system.

I certify that all parties of record to this appeal either are registered CM/ECF users, or have registered for electronic notice, or have consented in writing to electronic service, and that service will be accomplished through the CM/ECF system.

I further certify that I served the within document by either transmitting via **electronic mail** to the e-mail addresses set forth below on this date and/or addressed as set forth below by placing the document in a sealed **Federal Express** envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express for delivery the next business day.

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/s/ Hae Jung Park

BAP Case No. CC-11-1103  
Bankruptcy Court Case No. 1:11-bk-10426-VK

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**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

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In re GEORGES MARCIANO,  
  
Involuntary Debtor.

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GEORGES MARCIANO,  
Appellant/Involuntary Debtor,

vs.

GARY ISKOWITZ, THERESA ISKOWITZ, CAROLYN MALKUS, CAMILLE  
ABAT, MIRIAM CHOI, JOSEPH FAHS, STEVEN CHAPNICK and  
ELIZABETH TAGLE,  
Appellees.

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**DECLARATION OF DANIEL J. McCARTHY  
IN SUPPORT OF EMERGENCY MOTION  
FOR STAY PENDING APPEAL OF ORDERS DIRECTING  
APPOINTMENT OF CHAPTER 11 TRUSTEE AND  
APPOINTING CHAPTER 11 TRUSTEE**

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### DECLARATION OF DANIEL J. McCARTHY

I, Daniel J. McCarthy, declare:

1. I am an attorney law. I am duly qualified to practice before all courts of the State of California and all federal courts in the State of California, as well as certain other courts. I was admitted to the State Bar of California in 1981, and I have been a member in good standing since then. I am a partner at the law firm of Hill, Farrer & Burrill, LLP. I am counsel of record for involuntary debtor Georges Marciano in the involuntary Chapter 11 case filed against him. I also am counsel of record in the appeal pending before the Bankruptcy Appellate Panel ("BAP") from orders of the Bankruptcy Court that were entered in that Chapter 11 case and the Ninth Circuit from the BAP's order denying a stay pending appeal.

2. Since late August 2009, I have been co-counsel for judgment debtor Georges Marciano in the cases in the Los Angeles Superior Court (the "State Court") entitled *Georges Marciano v. Joseph Fahs, et al.*, bearing case no. BC375824 (the "*Fahs* action"), and entitled *Georges Marciano, et al. v. Gary Iskowitz, et al.*, bearing case no. BC384493, which was consolidated with case no. BC385790 entitled *Gary Iskowitz, et al. v. Georges Marciano, et al.* (collectively, the "*Iskowitz* action"). Since October 2009, my firm also has been counsel of record in the appeals from the default judgments entered in the *Fahs* action and the *Iskowitz* action, and I am partially responsible for representing Mr. Marciano in connection with those appeals. The appeals in the *Fahs* action are pending before Division Two of the Second Appellate District of the California Court of Appeals, and those appeals are assigned nos. B218087, B215463, B216598 and B220011 (the "*Fahs* appeal"). The appeals in the *Iskowitz* action are pending before Division Three of the Second Appellate District of the California Court of Appeals, and those appeals are assigned nos. B216029 and B219558 (the "*Iskowitz* appeal").

3. Georges Marciano filed two lawsuits in the Los Angeles County



Superior Court in August 2007 and January 2008 commencing the *Fahs* and *Iskowitz* actions. Almost all of the defendants in both lawsuits filed cross-complaints for defamation and related claims, such as infliction of emotional distress. Based upon discovery sanctions, Mr. Marciano's complaints in both lawsuits were stricken; his answers to the cross-complaints were stricken; and his defaults on the cross-complaints were entered. In the *Fahs* action, five default judgments were entered in favor of the defendants in late July 2009, although they later were reduced to a total of \$205 million. In the *Iskowitz* action, one default judgment totaling \$55 million was entered in August 2009 in favor of the three defendants.

4. Prior counsel for Mr. Marciano sought a stay of the default judgments from the State Court pending appeal, but was denied the stay because he could not post a bond of 1-1/2 times the \$260 million in default judgments. Thereafter, some of the judgment holders attempted to enforce their judgments for a period of approximately two months. I was involved in dealing with those judgment collection efforts against Mr. Marciano.

5. Mr. Marciano promptly appealed all of the default judgments on various grounds, including that (1) discovery sanctions were improper for many reasons; (2) the trial judge failed in multiple ways to fulfill her gate-keeping function in connection with the default judgment prove-up by, for example, allowing evidence of numerous statements not even alleged in the cross-complaints and then awarding damages based on those statements, awarding damages on conduct that was plainly privileged under California Civil Code § 47 and on causes of action barred by the applicable statute of limitations, and allowing in evidence known by the judge and the defendants' lawyers to be false; (3) the default judgments were excessive, especially when contrasted with judgments in cases presenting more compelling defamation claims; and (4) the judge denied Mr.

Marciano due process by refusing to recuse herself despite name-calling and other statements by her showing demonstrable bias. These and other issues have been raised by Mr. Marciano in the briefs filed by him in the *Fahs* and *Iskowitz* appeals, which I was partially responsible for drafting.

6. Mr. Marciano's appellant's opening brief in the *Iskowitz* appeal was filed with the Court of Appeal on July 30, 2010. Mr. Marciano did not request an extension of time to file that brief, although he made a motion to extend the word limit from 14,000 to 19,000 words, which was granted on July 21, 2010. A copy of his opening brief was filed with the Bankruptcy Court on August 13, 2010, as an attachment to Mr. Marciano's supplement to his motion for reconsideration [dkt. no. 116], and as an exhibit to the declaration of Dean E. Dennis [dkt. no. 125] filed on September 10, 2010, in opposition to the petitioning creditors' motion for summary judgment. Under California Rule of Court ("CRC") 8.212(a), the due date for respondents' opening brief in the *Iskowitz* appeal was 30 days later on August 29, 2010. On August 19, 2010, the respondents in that appeal filed a motion for a 60 day extension of time to file their respondents' brief. On August 23, 2010, Mr. Marciano filed an opposition due to Marciano's need to expeditiously pursue the appeal in light of the pending involuntary Chapter 11 case against him that is based upon the default judgments against him that are on appeal. On the same date the Court of Appeal issued an order extending the time to file the respondent's brief for 60 days to approximately October 29, 2010.

7. On October 26, 2010, the respondents in the *Iskowitz* appeal filed a motion for an additional extension, which Mr. Marciano opposed by opposition filed on October 28, 2010. On November 1, 2010, the Court of Appeal granted the respondents an additional 30 days to approximately November 28, 2010, and stating that no further extensions would be allowed respondents. That brought their total time to file a respondents' brief to 120 days. The respondents in the

*Iskowitz* appeal then violated that deadline, which caused the Court of Appeal to send out a default notice on December 1, 2010, requiring them to file their brief within 15 days or have the appeal decided without their brief. Finally, on December 13, 2010, they filed their brief. Mr. Marciano obtained a short extension to file his reply brief due to the holidays, and his reply brief was filed on February 2, 2011.

8. In the *Fahs* appeal, Mr. Marciano's opening brief was lodged on October 10, 2010, with an application for leave to file an oversized brief. On October 29, 2010, the Court of Appeal granted the application, filed Mr. Marciano's opening brief and ordered that respondents' brief be filed on January 31, 2011 (a ninety day briefing schedule). After waiting for most of the 90 days given by the Court to them to file their respondents' brief, on January 20, 2011, the defendants/respondents in the *Fahs* appeal filed a motion by which they sought to delay the appeal by requesting that the Court of Appeal strike Mr. Marciano's opening brief and order seven court reporters to assemble one consecutively-numbered reporters' transcript, which the lead reporter previously refused to do in response to the request of my office in July 2010. Mr. Marciano opposed the respondents' motion, but the Court of Appeal granted it on February 7, 2011. Once the consecutively numbered transcript is prepared, Mr. Marciano will need to re-file his opening brief with corrected page references and then the respondents' brief will be due in 30 days.

9. On October 27, 2009, three petitioning creditors filed an involuntary Chapter 11 petition against alleged debtor Georges Marciano. Those three creditors held three of the five default judgments that are the subject of the *Fahs* appeal.

10. On behalf of Mr. Marciano, I made a motion to dismiss the involuntary petition on grounds of insufficient process and lack of personal

jurisdiction because he had been served by mail at a residence in Beverly Hills where he had not resided for almost three months and because he had not even resided in the United States for more than two months at the time of attempted service by mail. The motion also was based on the grounds that a claim could not be stated because certain provisions of Chapter 11 applicable to individuals are unconstitutional. The motion was denied at hearing on January 13, 2010, by Judge Richard Neiter, who was sitting in for Judge Victoria Kaufman. [Dkt. no. 90.] I attended that hearing.

11. When Judge Kaufman returned from leave, she held a status conference on April 8, 2010. I attended that status conference. Despite the Court's negative reaction at the initial status conference to the possibility of staying the involuntary bankruptcy case while the State Court appeals proceeded, on April 26, 2010, on behalf of Mr. Marciano filed a motion to suspend the involuntary Chapter 11 case under 11 U.S.C. § 305(a) on grounds that the case should be dismissed or stayed until the State Court appeals were resolved, rather than proceeding with an involuntary case filed by three petitioning creditors whose excessive default judgments were on appeal. [Dkt. no. 57.] That motion was denied by order entered on July 2, 2010, which is one of the orders on appeal. [Dkt. no. 102.]

12. Despite the Court's negative reaction to Mr. Marciano's desire to take discovery, on his behalf I propounded interrogatories, propounded document requests and noticed depositions shortly after the April 8, 2010 status conference, but the petitioning creditors refused to respond and to appear for deposition. On May 13, 2010, on behalf of Mr. Marciano I filed a motion for terminating sanctions or, alternatively, to compel discovery responses, the production of documents and depositions from the petitioning creditors [dkt. no. 68], which was granted in part at hearing on July 2, 2010. [Dkt. no. 101.] What was granted at that hearing, however, was taken away at hearing on July 15, 2010, when the Bankruptcy Court

ordered that no discovery would occur in the case by any party until after the Court determined the summary judgment motions. [Dkt. no. 121.]

13. On July 8, 2010, on behalf of Mr. Marciano filed a motion for reconsideration of the Court's order denying his motion to suspend the case under 11 U.S.C. § 305(a). [Dkt. no. 105.] The petitioning creditors' opposition was filed on September 17, 2010. [Dkt. no. 138.] Mr. Marciano's reply was filed a week later. [Dkt. no. 140.] The motion was not heard by the Court until December 2, 2010, when it was denied at the hearing that I attended, and the order was entered on December 29, 2010. [Dkt. no. 164.] That order also is on appeal.

14. On July 14, 2010, the petitioning creditors filed a motion for summary judgment and supporting papers [dkt. nos. 107-113], which Mr. Marciano opposed. [Dkt. nos. 122-127.] Mr. Marciano's opposition included a cross-motion for summary judgment. [*Id.*] That opposition was the first brief filed by Mr. Marciano in which he fully addressed whether the petitioning creditors claims were in bona fide dispute because they were based on default judgments that were on appeal, which should be reversed. The petitioning creditors' reply papers were filed on September 21, 2010. [Dkt. nos. 133-137.]

15. At hearing on October 1, 2010, the Court continued the hearing until October 28, 2010, on the petitioning creditors' motion for summary judgment, Mr. Marciano's cross-motion for summary judgment, and Mr. Marciano's motion for reconsideration of the order denying his prior motion to dismiss or stay the case under 11 U.S.C. § 305(a). The Court ordered petitioning creditors and Mr. Marciano to file supplemental papers, which was done. [Dkt. no. 142, 144-150, 151-155.]

16. On its own motion, the Court continued the October 28 hearing to December 2, 2010.

17. At approximately 9:30 p.m. on December 1, 2010, the Court posted a

35 page tentative ruling on the matters scheduled for the next day. I was checking the tentative ruling throughout the day, and first saw it at approximately 10:00 p.m. on December 1. The next morning, I arrived at work early and spent approximately four hours carefully reading the ruling and preparing for the hearing, although I did not have time to read the legislative history surrounding the history cited in the tentative ruling and I did not have time to read any of the 11 new cases cited in the tentative ruling, although I was able to briefly scan two of the cases.

18. On December 2, 2010, at 1:30 p.m., at hearing on the pending motions, I requested that the Court postpone the hearing for a short time to permit Mr. Marciano's counsel to review the new cases cited by the Court in the tentative ruling and the three citations to the legislative history, which also had not been previously cited by the parties. The Court declined that request and proceeded with the hearing.

19. In opposition to the petitioning creditors' summary judgment motion and at the December 2 hearing, on behalf of Mr. Marciano I also requested that the Court permit Mr. Marciano an opportunity to conduct discovery on the issues of whether the petitioning creditors' default judgments were in bona fide dispute and whether the involuntary petition had been filed in bad faith. The Court also denied that request.

20. At the conclusion of the December 2 hearing, the Court ruled that the petitioning creditors' motion for summary judgment was granted, Mr. Marciano's cross-motion for summary judgment was denied, and Mr. Marciano's motion for reconsideration of the order denying a stay of the involuntary case also was denied.

21. On December 28, 2010, the Court entered its "Order (1) Granting Petitioning Creditors' Motion for Summary Judgment for the Entry of an Order for Relief Under Chapter 11 of Title 11 of the United States Code against Georges

Marciano, and (2) Denying Georges Marciano's Cross-Motion for Summary Judgment" [dkt. no. 159] and also entered the related "Order for Relief in the Instant Title 11 Case Against Georges Marciano" [dkt. no. 161] (collectively, the "December 28 Orders").

22. On December 28, 2010, the Court also entered its 31-page Memorandum of Decision, which was consistent with its tentative ruling on December 1. [Dkt. no. 160.]

23. On December 29, 2010, the Court entered its "Order Denying Motion for Reconsideration of Order Denying Motion to Dismiss or Stay Involuntary Chapter 11 Case." [Dkt. No. 164]. By that Order, it denied Mr. Marciano's motion for reconsideration of the Court's prior order denying his motion to stay the case under 11 U.S.C. § 305(a), which had been filed on July 8, 2010. [Dkt. no. 105.]

24. On December 29, 2010, on behalf of Mr. Marciano, I filed two documents. One was a motion for reconsideration of the Court's December 28 Orders granting petitioning creditors' motion for summary judgment, denying Mr. Marciano's cross-motion, and issuing an order for relief, and the related Memorandum of Decision. [Dkt. no. 162.] The second was an ex parte application for a 30-day temporary stay of the order for relief to allow the motion for reconsideration to be determined and, if denied, to allow a motion for stay pending appeal to be determined. [Dkt. no. 163.]

25. On January 6, 2011, on behalf of Mr. Marciano, I filed a motion for reconsideration [dkt. no. 171] regarding the Court's December 29, 2010 order [dkt. no. 164] denying his prior motion for reconsideration of the Court's order denying his motion to stay the case under 11 U.S.C. § 305(a).

26. Mr. Marciano's two motions for reconsideration were denied by orders entered on January 10, 2011. [Dkt. nos. 179 and 180.] The ex parte application for a temporary 30-day stay impliedly was ruled upon on January 24,



2011, as part of an order partially granting a similar motion, as described below.

27. On January 4, 2011, on behalf of Mr. Marciano, I filed a notice of appeal from the December 28 Orders; the related December 28 Memorandum of Decision; the December 29 order denying the July 8 motion for reconsideration; and four prior interlocutory orders that became subject to appeal upon entry of the order for relief. [Dkt. no. 169.] The appeal was referred to the BAP on January 5, 2011 [dkt. no. 170], and it has been docketed as BAP case no. 11-1008. Mr. Marciano's opening brief was due on February 22, 2011, and was filed on that date.

28. On January 10, 2011, on behalf of Mr. Marciano, I filed an amended notice of appeal [dkt. no. 181] that added the two January 10, 2011 orders denying his two motions for reconsideration that were entered earlier that day.

29. On January 11, 2011, I filed an emergency motion requesting that the Court extend Mr. Marciano's time by 30 days to file his schedules, statement of financial affairs, etc., and to otherwise comply with applicable requirements. [Dkt. no. 182.] On January 11, 2011, the Court issued an order extending his time only 14 days until January 25, 2011. [Dkt. no. 185 in case no. 09-39630.]

30. On January 11, 2011, on behalf of Mr. Marciano, I filed an emergency motion with the Bankruptcy Court by which he again requested that the Court issue a 30-day temporary stay of the December 28 Orders. The petitioning creditors filed an opposition on January 21. Later that day, I filed a supporting reply. By that motion Mr. Marciano also requested a suspension of the case under 11 U.S.C. § 305(a), now that the order for relief had been entered, and a stay pending appeal of the December 28 Orders. The motion was heard on January 24, 2011. I attended the hearing. On January 25, 2011, the Bankruptcy Court issued a temporary stay to enable Mr. Marciano to seek a stay pending appeal from the Bankruptcy Appellate Panel or from the District Court, if the appeal was



transferred there. [Docket no. 205.] By its terms, the stay was to expire upon the BAP entering its order denying the emergency stay motion on February 9, 2011. In granting the temporary 30-day stay, the Bankruptcy Court acknowledged the “unsettled” state of the law on issues of first impression, which are described below, but the Court declined to issue a stay of the December 28 Orders pending appeal pursuant to Rule 8005, choosing instead to leave that determination to the Bankruptcy Appellate Panel.

31. On January 25, 2011, the Bankruptcy Court also issued an order extending Mr. Marciano’s time to file his schedules, statement of financial affairs and other documents required by applicable law until 7 days after the BAP denied a stay pending appeal. [Dkt. no. 203.] Given that the stay was denied by the BAP on February 9, the extended due date was February 16, 2011, unless the Ninth Circuit entered a stay pending appeal. However, I understood that the spirit of the January 25, 2011 order was to extend Mr. Marciano’s time until after the Ninth Circuit also had ruled on a request for a stay pending appeal, although at hearing on March 4, 2011, the Bankruptcy Court informed me that it only intended to allow Mr. Marciano time to seek a stay from the BAP or District Court, but not the Ninth Circuit.

32. On January 27, 2011, on behalf of Mr. Marciano, I filed an emergency motion with the BAP by which he requested that the Court issue a stay of the December 28 Orders pending appeal. The petitioning creditors’ opposition was filed on Friday, February 4, 2011. I filed a reply for Mr. Marciano in February 9, 2011. Within hours of the reply being filed on February 9, the BAP issued its order denying the emergency motion. Although I raised the issue of the Bankruptcy Court’s loss of jurisdiction in the motion, the BAP did not comment on that.

33. On February 8, 2011, I filed a second amended notice of appeal with

the Bankruptcy Court, which added the January 25 “Order Granting Temporary Stay, But Denying Stay Pending Appeal of (1) Order Granting Petitioning Creditors’ Motion for Summary Judgment, and (2) Order for Relief” [docket no. 205], which was entered on January 25, 2011.

34. On February 10, 2011, I filed a notice of appeal of the BAP’s February 9 order and then prepared the emergency motion for stay pending appeal to file with the Ninth Circuit. The BAP delayed in referring the appeal to the Ninth Circuit. As of February 16 – the extended due date for the filing of schedules and the statement of financial affairs and compliance with other applicable requirements – the appeal still had not been referred.

35. On the morning of February 16, my secretary and I both spoke to the BAP clerk (Patty) who is responsible for referring the appeals filed with the BAP to the Ninth Circuit, which was necessary so the appeal could be assigned a case number. She said she only works on Wednesdays to Fridays and that she had not been in to take care of it. I informed her that I was waiting for the matter to be referred so that I could file an emergency motion with the Ninth Circuit, and I asked her if she could get the appeal referred as soon as possible. She said she would take care of it as soon as she could get to it, perhaps that day or the next day.

36. The appeal finally was referred by the BAP to the Ninth Circuit on February 17, 2011. When the case was assigned a number on February 18, I caused the emergency motion for a stay, the Appendix and a supporting declaration to be filed hours later on February 18 with the Ninth Circuit. Once the appeal to the Ninth Circuit was assigned a case number, on February 18, on behalf of Mr. Marciano I filed an emergency motion for stay pending appeal with the Ninth Circuit by which he requested a stay of the order for relief. The motion explained that he was threatened with irreparable injury in that, *inter alia*, he would be forced to waive his privacy rights by disclosing his complete financial condition in

schedules, a statement of financial affairs and other documents that he was required to file under Federal Rule of Bankruptcy Procedure 1007(b); by fulfilling the obligations imposed upon him by the Office of the U.S. Trustee; and by testifying at a meeting of creditors about his financial condition. His only alternative was to stand on his constitutional privacy rights and thereby risk the equally damaging alternative of a Chapter 11 trustee being appointed, resulting in control of his assets being taken away and possibly sold. He also explained that the petitioning creditors would face no substantial harm from a stay pending appeal given that there was no evidence that Mr. Marciano was diverting or concealing assets. In both his emergency motion and in his supporting reply brief, he explained why the Ninth Circuit had jurisdiction over the appeal from the BAP's denial of a stay pending appeal.

37. The Ninth Circuit entered an order on February 24, 2011, denying Mr. Marciano's motion for stay pending appeal, citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The Court also stated that it "may lack jurisdiction over the appeal because it seeks review of an interlocutory order by the Bankruptcy Appellate Panel." The Ninth Circuit did not address the threshold argument that the Bankruptcy Court lost jurisdiction to proceed when Mr. Marciano appealed from the order for relief. It ordered Mr. Marciano to move for voluntary dismissal of the appeal or to show cause why it should not be dismissed for lack of jurisdiction within 21 days of the order. On March 16, 2011, I filed the brief required by the Ninth Circuit, which explained the Court's appellate jurisdiction under 28 U.S.C. § 1292 (a)(1) and which included a renewed request that the Ninth Circuit issued stay pending appeal due to the fact that it does have jurisdiction over the appeal from the BAP's order denying a motion for stay pending appeal.

38. When the Ninth Circuit declined a stay pending appeal, Mr. Marciano chose to stand on his constitutional rights of privacy, and declined to file

schedules, a statement of financial affairs and other documents that he was required to file under Federal Rule of Bankruptcy Procedure 1007(b), and to fulfill the obligations imposed upon him by the Office of the U.S. Trustee. As a result, on March 1, 2011, certain creditors filed a motion for appointment of a Chapter 11 trustee and a related application for order shortening time for hearing on the motion based upon Mr. Marciano's failure to make financial disclosures. [Dkt. no. 213.] On March 2, 2011, the Court set the motion for hearing on March 4, 2011. [Dkt. no. 214.] The motion was joined by the U.S. Trustee and the petitioning creditors. Dkt. nos. 217 and 219.] Over Mr. Marciano's opposition [dkt. no. 218], the motion was granted at hearing on March 4, which I attended. On March 7, the Court entered its "Order Directing the Appointment of a Chapter 11 Trustee" [dkt. no. 221] (the "March 7 Order").

39. On March 8, 2011, on behalf of Mr. Marciano I filed a notice of appeal to the BAP from the Trustee Order. [Dkt. no. 222.] On March 9, 2011, on behalf of Mr. Marciano, I filed a motion for stay pending appeal of the Trustee Order with the Bankruptcy Court [dkt. no. 223], which it denied by order entered on March 11, 2011. [Dkt. no. 228.]

40. On March 11, 2011, the Bankruptcy Court entered an order appointing the Chapter 11 trustee designated by the Office of United States Trustee. [Dkt. no. 226.] On March 14, Mr. Marciano filed an amended notice of appeal to the BAP, which added that order and the March 11 order denying his motion for stay pending appeal. [Dkt. no. 234.]

41. On March 11, 2011, I received notice that the Bankruptcy Court had referred the appeal to the BAP that day. I subsequently checked periodically on PACER for a case number for the appeal. [Dkt. nos. 229 and 230.] Ten days later, on March 21, 2011, I still had not received notice from the BAP that the appeal had been docketed, so I had my secretary call the BAP clerk. She was told that the

BAP had received the appeal and had assigned it case number CC-11-1103, but that it had not docketed the appeal yet. She was told to wait at least a half hour so the appeal could be docketed and then we could e-file the documents relating to the motion for stay pending appeal.

42. The Court-appointed trustee (David Gottlieb) has hired the law firm of Pachulski, Stang, Ziehl & Jones to represent him in Mr. Marciano's Chapter 11 case, subject to Court approval. The both indicated as recently as March 15, 2011, in a telephone conversation with me that the trustee intends to proceed with fulfilling his statutory duties to the Chapter 11 estate, regardless of the potential risk of nonpayment if the order for relief were to be reversed.

The foregoing is within my personal knowledge. I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on March 21, 2011.

/s/ Daniel J. McCarthy  
Daniel J. McCarthy

### **CERTIFICATE OF SERVICE**

I hereby certify that on March 21, 2011, I electronically filed the foregoing document with the Clerk of the Court for the Bankruptcy Appellate Panel for the Ninth Circuit by using the CM/ECF system.

I certify that all parties of record to this appeal either are registered CM/ECF users, or have registered for electronic notice, or have consented in writing to electronic service, and that service will be accomplished through the CM/ECF system.

I further certify that I served the within document by either transmitting via **electronic mail** to the e-mail addresses set forth below on this date and/or addressed as set forth below by placing the document in a sealed **Federal Express** envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express for delivery the next business day.

**Via E-mail:**

Bradley E. Brook, Esq. - bbrook@bbrooklaw.com  
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**Via E-mail & Federal Express:**

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/s/ Hae Jung Park

BAP Case No. CC-11-1103  
Bankruptcy Court Case No. 1:11-bk-10426-VK

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**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

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In re GEORGES MARCIANO,  
  
Involuntary Debtor.

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GEORGES MARCIANO,  
Appellant/Involuntary Debtor,

vs.

GARY ISKOWITZ, THERESA ISKOWITZ, CAROLYN MALKUS, CAMILLE  
ABAT, MIRIAM CHOI, JOSEPH FAHS, STEVEN CHAPNICK and  
ELIZABETH TAGLE,  
Appellees.

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**APPELLANT'S APPENDIX IN SUPPORT OF EMERGENCY MOTION  
FOR STAY PENDING APPEAL OF ORDERS DIRECTING  
APPOINTMENT OF CHAPTER 11 TRUSTEE AND  
APPOINTING CHAPTER 11 TRUSTEE**

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Daniel J. McCarthy (SBN 101081)  
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Facsimile: (213) 624-4840  
Attorneys for Appellant/Involuntary Debtor  
Georges Marciano



In compliance with BAP Rule 8011(d)-1, appellant/involuntary debtor Georges Marciano submits a conformed copy of the following documents in support of his “Emergency Motion for Stay Pending Appeal of Orders Directing Appointment of Chapter 11 Trustee and Appointing Chapter 11 Trustee,” as required by that rule:

<b><u>Exh.</u></b>	<b><u>Document:</u></b>	<b><u>Page</u></b>
1.	“Notice of Appeal” filed on March 9, 2011.	005-015
2.	“Amended Notice of Appeal” March 14, 2011.	016-039
3.	“Order Directing the Appointment of a Chapter 11 Trustee,” which was entered on March 7, 2011.	040-045
4.	“Order Approving Appointment of a Chapter 11 Trustee, ” which was entered on March 11, 2011.	046-052
5.	<p>“Order Denying Motion for Temporary Stay and for Stay Pending Appeal of Order Directing the Appointment of a Chapter 11 Trustee,” entered on March 11, 2011. Pursuant to BAP Rule 8001(d)-1(c)(3), appellant states that this Order briefly describes the grounds for the Bankruptcy Court’s denial of his stay motion as follows:</p> <p style="padding-left: 40px;">“Debtor has not demonstrated that he is entitled to a temporary stay or stay pending appeal under the factors enunciated in <i>In re Wymer</i>, 5 B.R. 802 (9th Cir. BAP 1980). In particular, it appears that: (1) Debtor is not likely to succeed on the merits of the appeal; (2) Debtor will not suffer irreparable injury absent a stay; (3) the stay would prejudice the appellees; and (4) the stay would do harm to the public interest.”</p> <p>No further explanation is provided for the Court’s</p>	053-057

	conclusions, and no hearing was held on the stay motion.	
6.	“Motion for Temporary Stay and for Stay Pending Appeal of Order Directing the Appointment of a Chapter 11 Trustee; Memorandum of Points and Authorities; Declaration of Daniel J. McCarthy,” filed on March 10, 2011.	058-094

DATED: March 21, 2011

HILL, FARRER & BURRILL LLP

By: /s/ Daniel J. McCarthy

Daniel J. McCarthy  
Attorneys for Appellant/Involuntary  
Debtor GEORGES MARCIANO

### **CERTIFICATE OF SERVICE**

I hereby certify that on March 21, 2011, I electronically filed the foregoing document with the Clerk of the Court for the Bankruptcy Appellate Panel for the Ninth Circuit by using the CM/ECF system.

I further certify that parties of record to this appeal who either are registered CM/ECF users, or who have registered for electronic notice, or who have consented in writing to electronic service, will be served through the CM/ECF system.

I further certify that I served the within document by either transmitting via **electronic mail** to the e-mail addresses set forth below on this date and/or addressed as set forth below by placing the document in a sealed **Federal Express** envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express for delivery the next business day.

**Via E-mail:**

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/s/ Hae Jung Park

**EXHIBIT 1**

Case 1:11-bk-10426-VK Doc 222 Filed 03/08/11 Entered 03/08/11 08:28:30 Desc  
Main Document Page 1 of 11

Attorney or Appellant, Address, Telephone & FAX Numbers, and California State Bar Number Daniel J. McCarthy (SBN 101081) Hill, Farrer & Burrill, LLP 300 South Grand Avenue 37th Floor Los Angeles, CA 90071 Tel.: (213) 621-0802 Fax: (213) 624-4840 Attorney for Appellant Debtor in Possession Georges Marciano	FOR COURT USE ONLY
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA	
In re: GEORGES MARCIANO,  Debtor(s).	
Last four digits of Social Security Number(s):	CHAPTER: 11 CASE NUMBER: 1:11-bk-10426-VK
Employer's Tax Identification No(s) (if any):	ADVERSARY NUMBER: (Former case no. 2:09-bk-39630-VK)

### NOTICE OF APPEAL

- NOTICE IS HEREBY GIVEN that the (check only one box) ☐ plaintiff ☐ defendant or ☒ other party (specify name of party) Georges Marciano, debtor in possession, appeals under 28 U.S.C. § 158(a) or (b) from the judgment, order, or decree of the bankruptcy judge (describe judgment, order, or decree) Order Directing The Appointment of A Chapter 11 Trustee entered in this adversary proceeding or other proceeding (describe other proceeding) the Chapter 11 case on the 7th day of March, (year) 2011.  
Copy of Order attached
- The names of all parties to the judgment, order, or decree appealed from and the names, addresses, telephone, and fax numbers of their respective attorneys are as follows (print or type names, addresses, telephone, and fax numbers):  
See Exhibit A hereto

(Continued on next page)

Case 1:11-bk-10426-VK Doc 222 Filed 03/08/11 Entered 03/08/11 08:28:30 Desc

Main Document Page 2 of 11

Notice of Appeal - Page 2

FORM 17

In re GEORGES MARCIANO,

Debtor(s).

CHAPTER: 11

CASE NUMBER: 1:11-bk-10426-VK

HILL, FARRER &amp; BURRILL, LLP

Dated: March 8, 2011

/s/ Daniel J. McCarthy*Signature (Attorney for Appellant or Appellant if not represented  
by an Attorney)*

Attorney for Appellant Georges Marciano

Daniel J. McCarthy (SBN 101081)*Attorney Name*300 S. Grand Ave., 37th Floor*Address* Los Angeles, CA 90071Tel.: (213) 621-0802*Telephone Number*

If a Bankruptcy Appellate Panel Service is authorized to hear this appeal, each party has a right to have the appeal heard by the district court. The appellant may exercise this right only by filing a separate statement of election at the time of the filing of this Notice of Appeal. Any other party may elect, within the time provided in 28 U.S.C. § 158(c), to have the appeal heard by the district court.

*If a child support creditor or its representative is the appellant, and if the child support creditor or its representative files the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.*

**EXHIBIT A TO NOTICE OF APPEAL**

The names of all parties to the judgment, order, or decree appealed from and names, address, telephone, fax numbers and email addresses of their respective attorneys are as follows:

Parties to appeal	Attorneys for Parties
Georges Marciano, debtor in possession and appellant	Daniel J. McCarthy Hill, Farrer & Burrill, LLP 300 South Grand Ave., 37th Floor Los Angeles, CA 90071 Tel.: (213) 621-0802 Fax: (213) 624-4840 email: dmccarthy@hillfarrer.com
Steven Chapnick, Joseph Fahs and Elizabeth Tagle, petitioning creditors and respondents	Bradley E. Brook Law Offices of Bradley E. Brook 11500 W. Olympic Blvd., Suite 400 Los Angeles, CA 90064 Tel: (310) 839-2004 Fax: (310) 945-0022 email: bbrook@bbrooklaw.com



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Main Document Page 4 of 11

<b>Gary Iskowitz, Theresa Iskowitz, Carolyn Malkus, Camille Abart and Miriam Choi, creditors and respondents</b>	<b>Peter A. Davidson Ervin, Cohen &amp; Jessup LLP 9401 Wilshire Boulevard, 9th Floor Beverly Hills, CA 90212-2974 Tel. (310) 273-6333 Fax: (310) 859-2325 email: pdavidson@ecjlaw.com</b>
<b>Office of United States Trustee, respondent</b>	<b>Dare Law Office of United States Trustee 725 South Figueroa Str., #2600 Los Angeles, CA 90017 Tel.: (213) 894-6811 Fax: (213) 894-2603 email: dare.law@usdoh.gov</b>

Case 1:11-bk-10426-VK Doc 222 Filed 03/08/11 Entered 03/08/11 08:28:30 Desc  
 Case 1:11-bk-10426-VK Doc 222 Filed 03/07/11 Entered 03/07/11 12:57:07 Desc  
 Main Document Page 1 of 6

FILED &amp; ENTERED

MAR 07 2011

CLERK U.S. BANKRUPTCY COURT  
 Central District of California  
 BY harraway, DEPUTY CLERK

Peter A. Davidson (SBN 76194)  
 pdavidson@ecflaw.com  
 ERVIN, COHEN & JESSUP LLP  
 9401 Wilshire Boulevard, Ninth Floor  
 Beverly Hills, California 90212-2974  
 Telephone (310) 273-6333  
 Facsimile (310) 859-2325

Attorneys for Gary and Theresa Iskowitz,  
 Carolyn Malkus, Miriam Choi and Camille Abat

CHANGES MADE BY COURT

UNITED STATES BANKRUPTCY COURT  
 CENTRAL DISTRICT OF CALIFORNIA  
 SAN FERNANDO VALLEY DIVISION

In re

GEORGES MARCIANO,  
 Debtor.

Case No. 1:11-bk-10426-VK

Chapter 11

**ORDER DIRECTING THE APPOINTMENT  
 OF A CHAPTER 11 TRUSTEE**

Date: March 4, 2011  
 Time: 2:00 p.m.  
 Place: Crtrm. 301

The motion of Creditors, Gary and Theresa Iskowitz, Carolyn Malkus, Miriam Choi and Camille Abat, for an order appointing a Chapter 11 Trustee in this case came on for hearing, having been duly noticed, on March 4, 2011 at 2:00 p.m. in Courtroom 301 of the above-entitled Court, the Court having previously entered the order shortening time for a hearing on the motion. The Court having reviewed the motion, the opposition filed by Georges Marciano, the joinder in the motion filed by the United States Trustee, having heard argument of counsel, and for the reasons stated on the record at the hearing and good cause appearing therefor,

IDOCs:13694.1;1183414.1

ORDER FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE

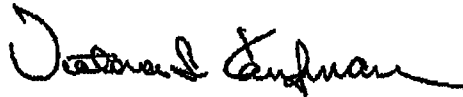
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IT IS ORDERED,

1. The Motion is granted.
2. The United States Trustee shall appoint a Chapter 11 Trustee in this case.

# # #



DATED: March 7, 2011

Case 1:11-bk-10426-VK Doc 222 Filed 03/08/11 Entered 03/08/11 08:28:30 Desc

Case 1:11-bk-10426-VK Doc 222 Filed 03/07/11 Entered 03/07/11 12:57:07 Desc  
Main Document Page 3 of 6

1 In re:	CHAPTER 11
2 GEORGES MARCIANO,	CASE NUMBER: 1:11-bk-10426-VK
3 Debtor(s).	

NOTE: When using this form to indicate service of a proposed order, DO NOT list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on the CM/ECF docket.

### PROOF OF SERVICE OF DOCUMENT (ORDER/JUDGMENT)

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 9401 Wilshire Blvd., 9<sup>th</sup> Floor, Beverly Hills, CA 90212-2974.

A true and correct copy of the foregoing document described as [PROPOSED] ORDER FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE, will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner indicated below:

I. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** -- Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On \_\_\_\_\_ I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

☐ Service information on attached page

II. **SERVED BY U.S. MAIL AND/OR OVERNIGHT MAIL:** On March 4, 2011, I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Bankruptcy Judge (by Overnight Mail)  
Hon. Victoria Kaufman  
U.S. Bankruptcy Court / San Fernando Valley  
21041 Burbank Blvd., Suite 354/Courtroom 301  
Woodland Hills, CA 91387

☒ Service information on attached page

III. **SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL** (Indicate method for each person or entity served): Pursuant to F.R.Cv.P. 5 and/or controlling LBR, on \_\_\_\_\_ I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on the judge will be completed no later than 24 hours after the document is filed.

☐ Service information on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

March 4, 2011  
Date

Lore Pekrul  
Type Name

/s/ Lore Pekrul  
Signature

DOC#: 13694.1:1183414.1

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ORDER FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE

011

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 Case 1:11-bk-10426-VK Doc 222 Filed 03/07/11 Entered 03/07/11 12:57:07 Desc  
 Main Document Page 4 of 6

1 **II. SERVED BY U.S. MAIL:**

2 **Counsel to Debtor Georges Marciano**  
 3 Daniel J. McCarthy, Esq.  
 4 Hill, Farrer & Burrill LLP  
 5 One California Plaza - 37th Floor  
 6 300 So. Grand Avenue  
 7 Los Angeles, California 90071-3147

8 **Debtor**  
 9 Georges Marciano  
 10 1000 N. Crescent Drive  
 11 Beverly Hills, CA 90210

12 **Dare Law on behalf of U.S. Trustee United States Trustee (LA)**  
 13 Dare Law, Esq.  
 14 Office of the United States Trustee  
 15 725 S Figueroa St #2600  
 16 Los Angeles, CA 90017

17 **Bradley E. Brook on behalf of Attorney Bradley Brook**  
 18 Law Offices of Bradley E Brook  
 19 11500 W Olympic Blvd Ste 400  
 20 Los Angeles, CA 90064

ERVIN COHEN JESSUP

Case 1:11-bk-10426-VK Doc 222 Filed 03/08/11 Entered 03/08/11 08:28:30 Desc

Case 1:11-bk-10426-VK Doc 222 Filed 03/07/11 Entered 03/07/11 12:57:07 Desc

Main Document Page 5 of 6

In re:	CHAPTER 11
GEORGES MARCIANO,	
Debtor.	CASE NO. 1:11-BK-10426-VK

**NOTE TO USERS OF THIS FORM:**

- 1) Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
- 2) The title of the judgment or order and all service information must be filled in by the party lodging the order.
- 3) Category I. below: The United States trustee and case trustee (if any) will always be in this category.
- 4) Category II. below: List ONLY addresses for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. **DO NOT** list an address if person/entity is listed in category I.

**NOTICE OF ENTERED ORDER AND SERVICE LIST**

Notice is given by the court that a judgment or order entitled **ORDER DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE**, was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

**I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of March 4, 2011, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

☒ Service information on attached page

**II. SERVED BY THE COURT VIA U.S. MAIL:** A copy of this notice and a true copy of this judgment or order was sent by United States Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

Bankruptcy Judge (by Overnight Mail)  
Hon. Victoria Kaufman  
U.S. Bankruptcy Court / San Fernando Valley  
21041 Burbank Blvd., Suite 354/Courtroom 301  
Woodland Hills, CA 91387

☒ Service information continued on attached page

**III. TO BE SERVED BY THE LODGING PARTY:** Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s), and/or email address(es) indicated below:

☐ Service information continued on attached page

IDOCs:13694.1:1183414.1

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ORDER FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE

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 Case 1:11-bk-10426-VK Doc 222 Filed 03/07/11 Entered 03/07/11 12:57:07 Desc  
 Main Document Page 6 of 6

ERVIN COHEN JESSUP

1 **I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF"):**

2 Bradley E Brook on behalf of Attorney Bradley Brook  
 bbrook@bbrooklaw.com, jimmy@bbrooklaw.com; brookecfmail@gmail.com

3 Peter A Davidson on behalf of Creditor Camille Abat  
 pdavidson@scjlaw.com

4 Dare Law on behalf of U.S. Trustee United States Trustee (LA)  
 dare.law@usdoj.gov

6 Daniel J McCarthy on behalf of Debtor Georges Marciano  
 dmccarthy@hlllfarrer.com

8 Anthony J Rothman on behalf of Attorney Bradley Brook.  
 anthony@arothmanlaw.com

9 Kenneth N Russak on behalf of Interested Party Courtesy NEF  
 krussak@frandzel.com, efilling@frandzel.com; lokubo@frandzel.com

11 Richard Seegman on behalf of Interested Party Courtesy NEF  
 rseegman@wolfgroupia.com, kmanning@wolfgroupia.com; ltarring@wolfgroupia.com

12 Rameesh Singh on behalf of Interested Party Courtesy NEF  
 claims@recoverycorp.com

13 United States Trustee (LA) ustpregion16.la.ecf@usdoj.gov

15 **II. SERVED BY U.S. MAIL:**

16 Debtor  
 Georges Marciano  
 1000 N. Crescent Drive  
 Beverly Hills, CA 90210



Case 1:11-bk-10426-VK Doc 222 Filed 03/08/11 Entered 03/08/11 08:28:30 Desc  
Main Document Page 11 of 11

## PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 300 S. Grand Avenue, 37th Floor, Los Angeles, California 90071

A true and correct copy of the foregoing document described **NOTICE OF APPEAL** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner indicated below:

**I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On March 8, 2011, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

Bradley E Brook bbrook@bbrooklaw.com, jimmy@bbrooklaw.com;brookectmail@gmail.com  
Peter A Davidson pdavidson@ecjlaw.com  
Dare Law dare.law@usdoj.gov  
Anthony J Rothman anthony@arothmanlaw.com  
Kenneth N Russak krussak@frandzel.com, efilling@frandzel.com;tkuboo@frandzel.com  
Richard Seegman rseegman@wolfgroupia.com, kmanning@wolfgroupia.com;ltarring@wolfgroupia.com  
Ramesh Singh claims@recoverycorp.com  
United States Trustee (LA) ustprgion16.la.ecf@usdoj.gov

☐ Service Information continued on attached page

**II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL (Indicate method for each person or entity served):**

On March 8, 2011, I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed

The Honorable Victoria Kaufman  
United States Bankruptcy Court  
21041 Burbank Blvd., Suite 305  
Woodland Hills, CA 91367-6608

☐ Service Information continued on attached page

**III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (Indicate method for each person or entity served):** Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on \_\_\_\_\_, I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on the judge will be completed no later than 24 hours after the document is filed.

☐ Service Information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

March 8, 2011  
Date

Hae Jung Park  
Type Name

/s/ Hae Jung Park  
Signature

**EXHIBIT 2**

Case 1:11-bk-10426-VK Doc 234 Filed 03/14/11 Entered 03/14/11 09:59:30 Desc

Attorney of Appellant: Address: Telephone: FAX Number: and California State Bar Number: Daniel J. McCarthy (SBN 101081) Hill, Farrer & Burnil, LLP 900 South Grand Avenue 37th Floor Los Angeles, CA 90071 Tel.: (213) 621-0602 Fax: (213) 621-4840 Attorney for Appellant: Debtor in Possession: Georges Marciano		FOR COURT USE ONLY
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA In re: <b>GEORGES MARCIANO</b> Debtor(s)		
Last four digits of Social Security Number(s): Employer's Tax Identification No(s) (if any):		
		CHAPTER <u>11</u> CASE NUMBER: <u>1:11-bk-10426-VK</u> ADVERSARY NUMBER: (Former case no. <u>2:09-bk-39630-VK</u> )

### AMENDED NOTICE OF APPEAL

- NOTICE IS HEREBY GIVEN that the (check only one box) ☐ plaintiff ☐ defendant or ☒ other party (specify name of party) Georges Marciano, debtor in possession, appeals under 28 U.S.C. § 158(a) or (b) from the judgment, order, or decree of the bankruptcy judge (describe judgment, order, or decree) See Exhibit A hereto entered in this adversary proceeding or other proceeding (describe other proceeding) the Chapter 11 case on the See Exh. A day of See Exhibit A (year) See Exhibit A.  
 Copy of Order's attached
- The names of all parties to the judgment, order, or decree appealed from and the names, addresses, telephone, and fax numbers of their respective attorneys are as follows (print or type names, addresses, telephone, and fax numbers):  
See Exhibit B hereto

(Continued on next page)

Case 1:11-bk-10426-VK Doc 234 Filed 03/14/11 Entered 03/14/11 09:59:30 Desc

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FORM 17

In re: <b>GEORGES MARGIANO</b>	CHAPTER: <b>11</b> CASE NUMBER: <b>1:11-bk-10426-VK</b>
--------------------------------	--

**HILL, FARRER & BURRILL, LLP**

Dated: March 14, 2011

/s/ Daniel J. McCarthy

Signature (Attorney for Appellant or Appellant if not represented by an Attorney)

Attorney for Appellant **Georges Margiano****Daniel J. McCarthy (SBN 101081)**

Attorney Name

**300 St. Grand Ave., 37th Floor**Address **Los Angeles, CA 90071****Tel.: (213) 621-0802**

Telephone Number

If a Bankruptcy Appellate Panel Service is authorized to hear this appeal, each party has a right to have the appeal heard by the district court. The appellant may exercise this right only by filing a separate statement of election at the time of the filing of this Notice of Appeal. Any other party may elect, within the time provided in 28 U.S.C. § 168(c), to have the appeal heard by the district court.

If a child support creditor or its representative is the appellant, and if the child support creditor or its representative files the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

**EXHIBIT A TO AMENDED NOTICE OF APPEAL**

The Orders appealed from by this Amended Notice of Appeal, which were entered in the Chapter 11 case, are as follows:

1. Order Directing the Appointment of a Chapter 11 Trustee, entered March 7, 2011 [docket no. 221].
2. Order Approving the Appointment of a Chapter 11 Trustee, entered March 11, 2011 [docket no. 226].
3. Order Denying Motion for Temporary Stay and for Stay Pending Appeal of Order Directing the Appointment of a Chapter 11 Trustee, entered March 11, 2011 [docket no. 228].

**EXHIBIT B TO AMENDED NOTICE OF APPEAL**

The names of all parties to the judgment, order, or decree appealed from and names, address, telephone, fax numbers and email addresses of their respective attorneys are as follows:

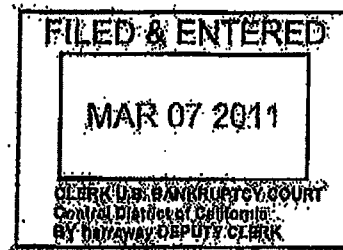
Parties to appeal	Attorneys for Parties
Georges Marciano, debtor in possession and appellant	Daniel J. McCarthy Hill, Farrer & Burrill, LLP 300 South Grand Ave., 37th Floor Los Angeles, CA 90071 Tel.: (213) 621-0802 Fax: (213) 624-4840 email: dmccarthy@hillfarrer.com
Steven Chapnick, Joseph Fahs and Elizabeth Tagle, petitioning creditors and respondents	Bradley E. Brook Law Offices of Bradley E. Brook 11500 W. Olympic Blvd., Suite 400 Los Angeles, CA 90064 Tel: (310) 839-2094 Fax: (310) 945-0022 email: bbrook@bbrooklaw.com

<p>Gary Iskowitz, Theresa Iskowitz, Carolyn Malkus, Camille Abart and Miriam Choi, creditors and respondents</p>	<p>Peter A. Davidson Ervin, Cohen &amp; Jessup LLP 9401 Wilshire Boulevard, 9th Floor Beverly Hills, CA 90212-2974 Tel. (310) 273-6833 Fax (310) 859-2325 email: pdavidson@ecjlaw.com</p>
<p>Office of United States Trustee, respondent</p>	<p>Dare Law Office of United States Trustee 725 South Figueroa St., #2600 Los Angeles, CA 90017 Tel.: (213) 894-6811 Fax: (213) 894-2603 email: dare.law@usdeb.gov</p>



Case 1:11-bk-10426-VK Doc 234 Filed 03/14/11 Entered 03/14/11 09:59:30 Desc  
 Case 1:11-bk-10426-VK Doc 234 Filed 03/07/11 Entered 03/07/11 12:07:07 Desc  
 Main Document Page 1 of 6

1 Peter A. Davidson (SBN 76194)  
 pdavidson@ecflaw.com  
 2 ERVIN, COHEN & JESSUP LLP  
 9401 Wilshire Boulevard, Ninth Floor  
 3 Beverly Hills, California 90212-2974  
 Telephone (310) 273-6333  
 4 Facsimile (310) 859-2325



5 Attorneys for Gary and Theresa Iskowitz,  
 Carolyn Malkus, Miriam Choi and Camille Abat.

CHANGES MADE BY COURT

UNITED STATES BANKRUPTCY COURT  
 CENTRAL DISTRICT OF CALIFORNIA  
 SAN FERNANDO VALLEY DIVISION

In re:

GEORGES MARCIANO,

Debtor.

Case No. 1:11-bk-10426-VK

Chapter 11

ORDER DIRECTING THE APPOINTMENT  
 OF A CHAPTER 11 TRUSTEE

Date: March 4, 2011

Time: 2:00 p.m.

Place: Courtroom 301

The motion of Creditors, Gary and Theresa Iskowitz, Carolyn Malkus, Miriam Choi and  
 Camille Abat, for an order appointing a Chapter 11 Trustee in this case came on for hearing,  
 having been duly noticed, on March 4, 2011 at 2:00 p.m. in Courtroom 301 of the above-entitled  
 Court, the Court having previously entered the order shortening time for a hearing on the motion.  
 The Court having reviewed the motion, the opposition filed by Georges Marciano, the joinder in  
 the motion filed by the United States Trustee, having heard argument of counsel, and for the  
 reasons stated on the record at the hearing and good cause appearing therefor,

DOC#13694.11183718.1

ORDER FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE

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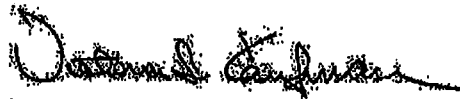
ERVIN COHEN & JESSUP

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IT IS ORDERED:

1. The Motion is granted.
2. The United States Trustee shall appoint a Chapter 11 Trustee in this case.

\*\*\*



United States Bankruptcy Judge

DATED: March 7, 2011

DOCS:18941:11834141

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ORDER FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE

Case 1:11-bk-10426-VK Doc 234 Filed 03/14/11 Entered 03/14/11 09:59:30 Desc  
 Case 1:11-bk-10426-VK Main Document Page 8 of 24  
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IRVIN COHEN &amp; JESSURUN

My: <b>GEORGES MARCIANO</b> (Name)	<b>CHAPTER 11</b> <b>CASE NUMBER: 1:11-bk-10426-VK</b>
---------------------------------------	---

NOTE: When using this form to indicate service of a proposed order, DO NOT list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on the CM/ECF docket.

**PROOF OF SERVICE OF DOCUMENT (ORDER/JUDGMENT)**

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 9401 Wilshire Blvd., 9<sup>th</sup> Floor, Beverly Hills, CA 90212-2974.

A true and correct copy of the foregoing document described as: **PROPOSED ORDER FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE** will be served or was served (a) on the Judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner indicated below:

**I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On March 4, 2011, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

☒ Service information on attached page

**II. SERVED BY U.S. MAIL AND/OR OVERNIGHT MAIL**: On March 4, 2011, I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. Listing the Judge here constitutes a declaration that mailing to the Judge will be completed no later than 24 hours after the document is filed.

Bankruptcy Judge (by Overnight Mail)  
 Hon. Victoria Kaufman  
 U.S. Bankruptcy Court / San Fernando Valley  
 21041 Burbank Blvd., Suite 384 Courtroom 301  
 Woodland Hills, CA 91367

☒ Service information on attached page

**III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL** (Indicate method for each person or entity served): Pursuant to F.R.C.P. 5 and/or controlling LBR, on March 4, 2011, I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the Judge here constitutes a declaration that personal delivery on the Judge will be completed no later than 24 hours after the document is filed.

☐ Service information on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

March 4, 2011 Date	Lore Pokul Type Name	Lore Pokul Signature
-----------------------	-------------------------	-------------------------

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DOCS 13394.1 (3/3/11)

**ORDER FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE**

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 Case 1:11-bk-10426-VK Main Document Page 4 of 6  
 Main Document Page 4 of 6

1. II. SERVED BY U.S. MAIL:

2. Counsel to Debtor: Georgea Marolano  
 3. Daniel J. McCarthy, Esq.  
 4. Hill, Farrer & Burdill LLP  
 5. One California Plaza - 37th Floor  
 6. 300 So. Grand Avenue  
 7. Los Angeles, California 90071-3147

8. Debtor:  
 9. Georgea Marolano  
 10. 1000 N. Crescent Drive  
 11. Beverly Hills, CA 90210

12. Dare Law on behalf of U.S. Trustee: United States Trustee (L.A.)  
 13. Dare Law, Esq.  
 14. Office of the United States Trustee:  
 15. 725 S. Figueroa St #2600  
 16. Los Angeles, CA 90017

17. Bradley E. Brook on behalf of Attorney Bradley Brook  
 18. Law Offices of Bradley E. Brook  
 19. 11500 W. Olympic Blvd Ste 400  
 20. Los Angeles, CA 90064

IRVIN COHEN & JESSUP

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DOCS1369.11183414.1

ORDER FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE

Case 1:11-bk-10426-VK Doc 234 Filed 03/14/11 Entered 03/14/11 09:59:30 Desc  
 Case 1:11-bk-10426-VK Main Document Page 16 of 24 Entered 03/07/11 12:57:07 Desc  
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1	(In re)	<b>GEORGES MARCIANO</b>	Debtor.	CHAPTER 11
2				CASE NO. 11-11-BK-10426-VK

**NOTE TO USERS OF THIS FORM:**

- 1) Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
- 2) The title of the judgment or order and all service information must be filled in by the party lodging the order.
- 3) Category I, below: The United States trustee and case trustee (if any) will always be in this category.
- 4) Category II, below: List ONLY addresses for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. **DO NOT** list an address if person/entity is listed in category I.

**NOTICE OF ENTERED ORDER AND SERVICE LIST**

Notice is given by the court that a judgment or order entitled **ORDER DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE** was entered on the date indicated as "Entered" on the front page of this judgment or order and will be served in the manner indicated below:

I. **SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of March 4, 2011, the following person(s) are currently on the Electronic Mail Notice List for the bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

☐ Service information on attached page

II. **SERVED BY THE COURT VIA U.S. MAIL:** A copy of this notice and a true copy of this judgment or order was sent by United States Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

Bankruptcy Judge (by Overnight Mail)  
 Hon. Victoria Kaufman  
 U.S. Bankruptcy Court, San Fernando Valley  
 21041 Burbank Blvd., Suite 884/Courtroom 301  
 Woodland Hills, CA 91367

☐ Service information continued on attached page

III. **TO BE SERVED BY THE LODGING PARTY:** Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s), and/or email address(es) indicated below:

☐ Service information continued on attached page

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**ORDER FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE**



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 Case 1:11-bk-10426-VK Main Document Page 15 of 15 Entered 03/07/11 12:57:07 Desc  
 Main Document Page 6 of 6

ERVIN COHEN &amp; JESSUP

1 I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):

2 Bradley E. Brook on behalf of Attorney Bradley Brook:  
 bbrook@bbrooklaw.com, jimmy@bbrooklaw.com, brookedfmail@gmail.com

3 Peter A. Davidson on behalf of Creditor Camille Abat  
 pdavidson@eolaw.com

4  
 5 Dara Law on behalf of U.S. Trustee United States Trustee (LA)  
 dara.law@usdoj.gov

6 Daniel J. McCarthy on behalf of Debtor Georges Marciano  
 dmccarthy@hillfarra.com

7  
 8 Anthony J. Rothman on behalf of Attorney Bradley Brook  
 anthony@arothmanlaw.com

9 Kenneth N. Russak on behalf of Interested Party Courtesy NEF:  
 krussak@frandzel.com, efilling@frandzel.com, itakubo@frandzel.com

10 Richard Seegman on behalf of Interested Party Courtesy NEF  
 rseegman@wolfgroup.com, kmanning@wolfgroup.com, lanning@wolfgroup.com

11  
 12 Ramesh Singh on behalf of Interested Party Courtesy NEF  
 claims@recoverycorp.com

13 United States Trustee (LA) ustregion16.la.ecf@usdoj.gov

14

15 II. SERVED BY U.S. MAIL:

16 Debtor:  
 17 Georges Marciano  
 1000 N. Crescent Drive  
 Beverly Hills, CA 90210

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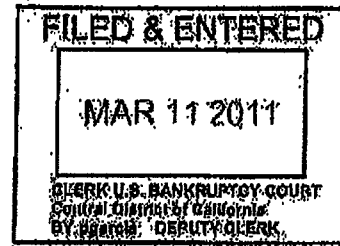
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DOCS 13094.1 (10/14/11)

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ORDER FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE



PETER C. ANDERSON  
UNITED STATES TRUSTEE  
JILL M. STURTEVANT, State Bar No. 089295  
ASSISTANT UNITED STATES TRUSTEE  
DARE LAW, State Bar No. 155714  
KATY KIP, State Bar No. 246487  
TRIAL ATTORNEY  
OFFICE OF THE UNITED STATES TRUSTEE  
725 South Figueroa Street, Suite 2600  
Los Angeles, California 90017-5418  
(213) 894-4925 telephone  
(213) 894-2603 facsimile  
Email: dare.law@usdoj.gov

UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SAN FERNANDO DIVISION

In re

GEORGE MARCIANO,

Debtor.

Case No. 11-1-bk-10426-VK

Chapter 11

ORDER APPROVING APPOINTMENT  
OF A CHAPTER 11 TRUSTEE

[NO HEARING REQUIRED]

The Court having considered the United States Trustee's Application For Order Approving Appointment Of Trustee And Fixing Bond ("Application"), and for good cause appearing,

IT IS HEREBY ORDERED that the Application is approved.

*[Signature]*

DATED: March 11, 2011

United States Bankruptcy Judge



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**NOTE:** When using this form to indicate service of a proposed order, **DO NOT** list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on the CM/ECF docket.

## PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

725 South Figueroa Street, Suite 2000, Los Angeles, California 90071-1574

A true and correct copy of the foregoing document described as **ORDER APPROVING APPOINTMENT OF A CHAPTER 11 TRUSTEE**

will be served or was served (a) on the Judge in chambers in the form and manner required by LBR 8005-2(d), and (b) in the manner indicated below:

I. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On 3/10/11 I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission of the email address(es) indicated below:

**NOT APPLICABLE**

☐ Service information continued on attached page.

II. **SERVED BY U.S. MAIL OR OVERNIGHT MAIL** (Indicate method for each person or entity served):  
 On 3/10/11 I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. Listing the Judge here constitutes a declaration that mailing to the Judge will be completed no later than 24 hours after the document is filed.

**SEE ATTACHED SERVICE LIST (IF APPLICABLE)**

☒ Service information continued on attached page.

III. **SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL** (Indicate method for each person or entity served): Pursuant to F.R.C.P. 6 and/or controlling LBR, on N/A I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the Judge here constitutes a declaration that personal delivery on the Judge will be completed no later than 24 hours after the document is filed. Upon filing, I will be giving a filed document to a Court delivery service consistent with our normal business practice with instructions to deliver the copy to the bin outside the suite (Court Manual Appendix F), as follows:

**NOT APPLICABLE**

☐ Service information continued on attached page.

I declare, under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

3/10/11  
Date

SONNY FLORES  
Type Name

/s/ Sonny Flores  
Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

August 2010.

**F.9013-3.1.PROOF.OF.SERVICE**

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 Main Document Page 3 of 7

**ADDITIONAL SERVICE INFORMATION****II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL:****DEBTOR:**

George Marciano  
 1010 N. Crescent Drive  
 Beverly Hills, CA 90210

**DEBTOR'S COUNSEL:**

Daniel J. McCarthy  
 Hill Parrett & Bohill LLP  
 300 S. Grand Ave. 37th Fl.  
 Los Angeles, CA 90071

**PETITIONING CREDITOR:**

Joseph Kahn  
 C/O Alain V. Bonaville Esq.  
 499 N. Canyon Dr. 4th Fl.  
 Beverly Hills, CA 90210

**CREDITOR'S COUNSEL:**

Bradley E. Brook  
 Law Offices of Bradley E. Brook  
 11500 W. Olympic Blvd. Ste. 400  
 Los Angeles, CA 90064

**PETITIONING CREDITOR:**

Elizabeth Eagle  
 C/O John D. Guerrini Esq.  
 750 E. Green St. Ste. 200  
 Pasadena, CA 91101

**CREDITOR:**

DREIER STEIN KATLAN BROWNE WOODS GEORGE LLP  
 3305 JERUSALEM AVE. STE 201  
 WANTAGH NEW YORK 11793

**CREDITOR:**

Franchise Tax Board  
 Bankruptcy Section MS A340  
 P.O. Box 2952  
 Sacramento CA 95812-2952

**CREDITOR:**

INTERNAL REVENUE SERVICE  
 300 North Los Angeles Street  
 M/S 5022  
 Los Angeles, CA 90012

**CREDITOR:**

Steven Chappick  
 C/O Michael J. Partos Esq.  
 777 S. Figueroa St. Ste. 2850  
 Los Angeles, CA 90017

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

August 2010

**F.9013-B.1.PROOF.OF.SERVICE**

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Case 1:11-bk-10426-VK Doc 234 Filed 03/14/11 Entered 03/14/11 09:59:30 Desc  
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**JUDGE'S COPY**

The Honorable Victoria S. Kaufman  
Judge Kaufman's Courtesy Copy  
21041 Burbank Blvd., Ste. 354  
Woodland Hills, CA 91367

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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

August 2010.

**F.9015-3.1 PROOF OF SERVICE**

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 Case 1:11-bk-10426-VK Main Document Page 18 of 24  
 Main Document Page 18 of 24

**NOTE TO USERS OF THIS FORM**

- 1) Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
- 2) The title of the judgment or order and all service information must be filed in by the party lodging the order.
- 3) Category I, below. The United States trustee and case trustee (if any) will always be in this category.
- 4) Category II, below. List ONLY addresses for debtor (and attorney), creditor (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. **DO NOT** list an address if person/entity is listed in category I.

**NOTICE OF ENTERED ORDER AND SERVICE LIST**

Notice is given by the court that a judgment or order entitled (specify): **ORDER APPROVING APPOINTMENT OF A CHAPTER 11 TRUSTEE**

was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. **SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)** Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of 3/10/11, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

Bradley B. Brook bbrook@bbrooklaw.com, jlitany@bbrooklaw.com, brooksoftmail@gmail.com  
 Peter A. Davidson pdavidson@cdlaw.com  
 Dare Law dare.law@usdcj.gov  
 Daniel J. McCarthy dmccarthy@hillfarrer.com  
 S. Margaux-Ross margaux.ross@usdcj.gov  
 Anthony J. Rollman anthony@arollmanlaw.com  
 Kenneth N. Ruskak kruskak@frandzel.com, srilling@frandzel.com, tkokubo@frandzel.com  
 Richard Stegman rsteegman@wolfgroupplc.com, kmmanning@wolfgroupplc.com, sharring@wolfgroupplc.com  
 Ramesh Singh slsingh@creativetv.com  
 United States Trustee (SV) usptrustee16@usdcj.gov

☐ Service information continued on attached page

II. **SERVED BY THE COURT VIA U.S. MAIL** A copy of this notice and a true copy of this judgment or order was sent by United States Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

**SEE ATTACHED SERVICE LIST (IF APPLICABLE)**

☒ Service information continued on attached page

III. **TO BE SERVED BY THE LODGING PARTY** Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated below:

**NOT APPLICABLE**

☐ Service information continued on attached page

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

August 2010

**F 9021-1.1 NOTICE ENTERED ORDER**

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 Case 1:11-bk-10426-VK Doc 234 Filed 03/14/11 Entered 03/14/11 09:57:40 Desc  
 Main Document Page 6 of 7

**ADDITIONAL SERVICE INFORMATION****II. SERVED BY THE COURT VIA U.S. MAIL:**

**DEBTOR:**  
 George Matelano  
 1000 N. Crescent Drive  
 Beverly Hills, CA 90210

**DEBTOR'S COUNSEL:**  
 Daniel J. McCarthy  
 Hill, Parer & Durall LLP  
 300 S. Grand Ave. 37th Fl  
 Los Angeles, CA 90071

**PETITIONING CREDITOR:**  
 Joseph Fahs  
 C/O Alain V. Bonaville Esq  
 499 N. Canon Dr. 4th Flr  
 Beverly Hills, CA 90210

**CREDITOR'S COUNSEL:**  
 Bradley E. Brook  
 Law Offices of Bradley E. Brook  
 11500 W. Olympic Blvd. Ste. 400  
 Los Angeles, CA 90064

**PETITIONING CREDITOR:**  
 Elizabeth Taylor  
 C/O John D. Quarini Esq  
 750 E. Green St. Ste. 200  
 Pasadena, CA 91101

**CREDITOR:**  
 DREIER STEIN KAHAN BROWNE WOODS GEORGE LLP  
 3305 JERUSALEM AVE STE 201  
 WANTAGH NEW YORK 11793

**CREDITOR:**  
 Franchise Tax Board  
 Bankruptcy Section MS-A340  
 P.O. Box 2952  
 Sacramento CA 95812-2952

**CREDITOR:**  
**INTERNAL REVENUE SERVICE**  
 200 North Los Angeles Street  
 MS-5022  
 Los Angeles, CA 90012

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

August 2010

**F 9021-1.1 NOTICE ENTERED ORDER**

CREDITOR:  
Steven Channick  
C/O Michael J. Porter Esq.  
777 S. Figueroa St. Ste 2830  
Los Angeles, CA 90017

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This form is mandatory, if has been approved for use by the United States Bankruptcy Court for the Central District of California.

August 2010.

F.9013-3.1.PROOF.OF.SERVICE

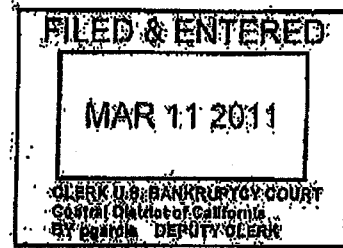
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Case 1:11-bk-10426-VK Doc 234 Filed 03/14/11 Entered 03/14/11 10:23:45 Desc  
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**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA**

In re:

Georges Marcelano;

Case No. 1:11-bk-10426-VK

Chapter: 11

ORDER DENYING MOTION FOR TEMPORARY  
STAY AND FOR STAY PENDING APPEAL OF  
ORDER DIRECTING THE APPOINTMENT OF A  
CHAPTER 11 TRUSTEE

Debtor(s).

Date:  
Time:  
Location:

On March 10, 2011, Georges Marcelano, the debtor in the above-captioned bankruptcy case ("Debtor"), filed an Application for Order Setting Hearing on Shortened Notice ("Application") and a Motion for Temporary Stay and For Stay Pending Appeal of Order Directing the Appointment of a Chapter 11 Trustee ("Motion"). The Court in a separate order denied the Application.

The Court has taken note of the Order of the Ninth Circuit Bankruptcy Appellate Panel, filed on February 9, 2011, and the Order of the Ninth Circuit Court of Appeals, filed on February 24, 2011, both of which deny Debtor's motion for a stay pending appeal of the entry of the order for relief in this case, entered on December 28, 2010. In addition, the Court has reviewed the Motion. With respect to the Court's order directing the appointment of a chapter 11 trustee, Debtor has not demonstrated that he is entitled to a temporary stay or stay pending appeal under the factors enunciated in *In re Wymer*, 53 B.R.



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1 802 (9<sup>th</sup> Cir. BAP 1980). In particular, it appears that: (1) Debtor is not likely to succeed on the merits  
2 of the appeal; (2) Debtor will not suffer irreparable injury absent a stay; (3) the stay would prejudice the  
3 appellees; and (4) the stay would do harm to the public interest. Accordingly, the Motion is hereby  
4 ORDERED DENIED.  
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DATED: March 11, 2011

  
United States Bankruptcy Judge

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**NOTE TO USERS OF THIS FORM:**

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- 2) The title of the judgment or order and all service information must be filled in by the party lodging the order.
- 3) Category I, below: The United States trustee and case trustee (if any) will always be in this category.
- 4) Category II, below: List ONLY addresses for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. DO NOT list an address if person/entity is listed in category I.

**NOTICE OF ENTERED ORDER AND SERVICE LIST**

Notice is given by the court that a judgment or order entitled (state) **ORDER DENYING MOTION FOR TEMPORARY STAY AND FOR STAY PENDING APPEAL OF ORDER DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below.

**I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), this foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of \_\_\_\_\_, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

☒ Service information continued on attached page

**II. SERVED BY THE COURT VIA U.S. MAIL** - A copy of this notice and a true copy of this judgment or order was sent by U.S. Mail to the following person(s) and/or entity(ies) at the address(es) indicated below:

☒ Service information continued on attached page

**III. TO BE SERVED BY THE LODGING PARTY** - Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated below:

☐ Service information continued on attached page

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**ADDITIONAL SERVICE INFORMATION (if needed):**

Category I (Served by the Court via Notice of Electronic Filing (NEF))

- Bradley E Brook: bbrook@bbrooklaw.com, jimmy@bbrooklaw.com, brookecfmail@gmail.com
- Peter A Davidson: pdavidson@ecflaw.com
- Dare Law: dare.law@usdoj.gov
- Daniel J. McCarthy: dmccarthy@billfarrer.com
- S Margaux Ross: margaux.ross@usdoj.gov
- Anthony J Rothman: anthony@arothmanlaw.com
- Kenneth N Russak: krussak@frandzel.com, ofiling@frandzel.com, jtokubo@frandzel.com
- Richard Seegman: rseegman@wolfgrouppla.com, kmanhinn@wolfgrouppla.com, harring@wolfgrouppla.com
- Ramesh Singh: claims@recoverycorp.com
- United States Trustee (SV): usptrgion16.wh.ecf@usdoj.gov
- Hatty K Yip: hatty.yip@usdoj.gov

Category II (Served by Court via U.S. mail)

George Marziano  
 1000 N. Crescent Drive  
 Beverly Hills, CA 90210

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Case 1:11-bk-10426-VK Doc 234 Filed 03/14/11 Entered 03/14/11 10:23:45 Desc  
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Category III (To be served by the logging party).

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## PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 300 S. Grand Avenue, 37th Floor, Los Angeles, California 90071

A true and correct copy of the foregoing document described **AMENDED NOTICE OF APPEAL** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005.2(d); and (b) in the manner indicated below:

**I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF").** Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On March 14, 2011, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

Bradley E. Brookbrook@brookslaw.com; Jimmy@brookslaw.com; brooksead@mail@gmail.com  
Peter A. Davidsonpdaidsn@scjlaw.com  
Dare Lawdare.law@usdoj.gov  
Anthony J. Rothmananthony@arothmanlaw.com  
Kenneth N. Russakkrussak@frandzel.com; efilling@frandzel.com; itokubo@frandzel.com  
Richard Seegmanrseegman@wolfgroupa.com; kmanning@wolfgroupa.com; itarring@wolfgroupa.com  
Ramash Singhclaims@recoverycorp.com  
United States Trustee (LA) uslpreqion16a.ecf@usdoj.gov

☐ Service information continued on attached page.

## II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL (Indicate method for each person or entity served):

On March 14, 2011, I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class postage prepaid, and/or with an overnight mail service addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

The Honorable Victoria Kaufman  
United States Bankruptcy Court  
21041 Burbank Blvd., Suite 305  
Woodland Hills, CA 91367-6606

☐ Service information continued on attached page.

**III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL.** (Indicate method for each person or entity served). Pursuant to F.R.Cv.P. 5 and/or controlling LBR, on March 14, 2011, I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

March 14, 2011

Hee Jung Park

/s/ Hee Jung Park

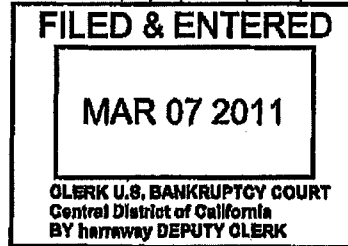
Date:

Type Name

Signature

**EXHIBIT 3**

Case 1:11-bk-10426-VK Doc 221 Filed 03/07/11 Entered 03/07/11 12:57:07 Desc  
Main Document Page 1 of 6



1 Peter A. Davidson (SBN 76194)  
pdavidson@ecjlaw.com  
2 ERVIN, COHEN & JESSUP LLP  
9401 Wilshire Boulevard, Ninth Floor  
3 Beverly Hills, California 90212-2974  
Telephone (310) 273-6333  
4 Facsimile (310) 859-2325

5 Attorneys for Gary and Theresa Iskowitz,  
Carolyn Malkus, Miriam Choi and Camille Abat

CHANGES MADE BY COURT

7  
8 UNITED STATES BANKRUPTCY COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 SAN FERNANDO VALLEY DIVISION

11 In re  
12 GEORGES MARCIANO,  
13 Debtor.

Case No. 1:11-bk-10426-VK

Chapter 11

14 ORDER DIRECTING THE APPOINTMENT  
15 OF A CHAPTER 11 TRUSTEE

16 Date: March 4, 2011  
Time: 2:00 p.m.  
Place: Crtm. 301

17 The motion of Creditors, Gary and Theresa Iskowitz, Carolyn Malkus, Miriam Choi and  
18 Camille Abat, for an order appointing a Chapter 11 Trustee in this case came on for hearing,  
19 having been duly noticed, on March 4, 2011 at 2:00 p.m. in Courtroom 301 of the above-entitled  
20 Court, the Court having previously entered the order shortening time for a hearing on the motion.  
21 The Court having reviewed the motion, the opposition filed by Georges Marciano, the joinder in  
22 the motion filed by the United States Trustee, having heard argument of counsel, and for the  
23 reasons stated on the record at the hearing and good cause appearing therefor,  
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EXHIBIT 3



Case 1:11-bk-10426-VK Doc 221 Filed 03/07/11 Entered 03/07/11 12:57:07 Desc  
Main Document Page 2 of 6

ERVIN COHEN JESSUP

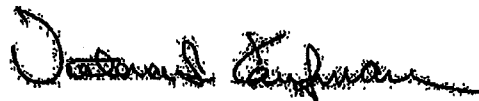
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IT IS ORDERED,

1. The Motion is granted.
2. The United States Trustee shall appoint a Chapter 11 Trustee in this case.

# # #

DATED: March 7, 2011

  
United States Bankruptcy Judge

Case 1:11-bk-10426-VK Doc 221 Filed 03/07/11 Entered 03/07/11 12:57:07 Desc  
Main Document Page 3 of 6

ERVIN COHEN JESSUP

<p>In re: <b>GEORGES MARCIANO,</b></p> <p style="text-align: right;">Debtor(s).</p>	<p><b>CHAPTER 11</b></p> <p><b>CASE NUMBER, 1:11-bk-10426-VK</b></p>
---	--

**NOTE:** When using this form to indicate service of a proposed order, **DO NOT** list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on the CM/ECF docket.

**PROOF OF SERVICE OF DOCUMENT (ORDER/JUDGMENT)**

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 9401 Wilshire Blvd., 9<sup>th</sup> Floor, Beverly Hills, CA 90212-2974.

A true and correct copy of the foregoing document described as **[PROPOSED] ORDER FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE**, will be served or was served (a) on the Judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner indicated below:

**I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** -- Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On \_\_\_\_\_ I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

☐ Service information on attached page

**II. SERVED BY U.S. MAIL AND/OR OVERNIGHT MAIL:** On March 4, 2011, I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. Listing the Judge here constitutes a declaration that mailing to the Judge will be completed no later than 24 hours after the document is filed.

Bankruptcy Judge (by Overnight Mail)  
Hon. Victoria Kaufman  
U.S. Bankruptcy Court / San Fernando Valley  
21041 Burbank Blvd., Suite 354/Courtroom 301  
Woodland Hills, CA 91367

☒ Service information on attached page

**III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (Indicate method for each person or entity served):** Pursuant to F.R.Civ.P. 6 and/or controlling LBR, on \_\_\_\_\_, I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the Judge here constitutes a declaration that personal delivery on the Judge will be completed no later than 24 hours after the document is filed.

☐ Service information on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

March 4, 2011	Lore Pekrul	/s/ Lore Pekrul
Date	Type Name	Signature

DOCS:13694.1:1183414.1

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ORDER FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE

Case 1:11-bk-10426-VK Doc 221 Filed 03/07/11 Entered 03/07/11 12:57:07 Desc  
Main Document Page 4 of 6

IRVIN COHEN JESSUP

- 1 **II. SERVED BY U.S. MAIL:**
- 2
- 3 Counsel to Debtor Georges Marciano
- 4 Daniel J. McCarthy, Esq.
- 5 Hill, Farrer & Burrill LLP
- 6 One California Plaza - 37th Floor
- 7 300 So. Grand Avenue
- 8 Los Angeles, California 90071-3147
- 9
- 10 Debtor
- 11 Georges Marciano
- 12 1000 N. Crescent Drive
- 13 Beverly Hills, CA 90210
- 14
- 15 Dare Law on behalf of U.S. Trustee United States Trustee (LA)
- 16 Dare Law, Esq.
- 17 Office of the United States Trustee
- 18 725 S Figueroa St #2800
- 19 Los Angeles, CA 90017
- 20
- 21 Bradley E. Brook on behalf of Attorney Bradley Brook
- 22 Law Offices of Bradley E Brook
- 23 11500 W Olympic Blvd Ste 400
- 24 Los Angeles, CA 90064
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Case 1:11-bk-10426-VK Doc 221 Filed 03/07/11 Entered 03/07/11 12:57:07 Desc  
Main Document Page 5 of 6

1 In re:	2	3
4 GEORGES MARCIANO,	5 Debtor.	6 CHAPTER 11
7	8	9 CASE NO. 1:11-BK-10426-VK

**NOTE TO USERS OF THIS FORM:**

- 1) Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
- 2) The title of the judgment or order and all service information must be filled in by the party lodging the order.
- 3) Category I. below: The United States trustee and case trustee (if any) will always be in this category.
- 4) Category II. below: List ONLY addressees for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. DO NOT list an address if person/entity is listed in category I.

**NOTICE OF ENTERED ORDER AND SERVICE LIST**

Notice is given by the court that a judgment or order entitled **ORDER DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE**, was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

**I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of March 4, 2011, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

☒ Service information on attached page

**II. SERVED BY THE COURT VIA U.S. MAIL:** A copy of this notice and a true copy of this judgment or order was sent by United States Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

Bankruptcy Judge (by Overnight Mail)  
Hon. Victoria Kaufman  
U.S. Bankruptcy Court / San Fernando Valley  
21041 Burbank Blvd., Suite 354/Courtroom 301  
Woodland Hills, CA 91367

☒ Service information continued on attached page

**III. TO BE SERVED BY THE LODGING PARTY:** Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s), and/or email address(es) indicated below:

☐ Service information continued on attached page

ERVIN COHEN JESSUP

Case 1:11-bk-10426-VK Doc 221 Filed 03/07/11 Entered 03/07/11 12:57:07 Desc  
Main Document Page 6 of 6

ERVIN COHEN JESSUP

1 **I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF"):**

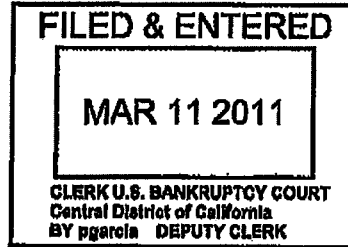
- 2 Bradley E Brook on behalf of Attorney Bradley Brook  
bbrook@bbrooklaw.com, jimmy@bbrooklaw.com;brookcecfmail@gmail.com
- 3 Peter A Davidson on behalf of Creditor Camille Abat  
pdavidson@ecf.law.com
- 4
- 5 Dare Law on behalf of U.S. Trustee United States Trustee (LA)  
dare.law@usdoj.gov
- 6 Daniel J McCarthy on behalf of Debtor Georges Marciano  
dmccarthy@hillfarrer.com
- 7
- 8 Anthony J Rothman on behalf of Attorney Bradley Brook  
anthony@arothmanlaw.com
- 9 Kenneth N Russak on behalf of Interested Party Courtesy NEF  
krussak@frandzel.com, efilling@frandzel.com;ltokubo@frandzel.com
- 10 Richard Seegman on behalf of Interested Party Courtesy NEF  
rseegman@wolfgroupia.com, kmanning@wolfgroupia.com;ltarring@wolfgroupia.com
- 11
- 12 Ramesh Singh on behalf of Interested Party Courtesy NEF  
claims@recoverycorp.com
- 13 United States Trustee (LA) ustpreion16.la.ecf@usdoj.gov
- 14

15 **II. SERVED BY U.S. MAIL:**

- 16 Debtor  
Georges Marciano  
17 1000 N. Crescent Drive  
Beverly Hills, CA 90210
- 18
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**EXHIBIT 4**

Case 1:11-bk-10426-VK Doc 226 Filed 03/11/11 Entered 03/11/11 09:57:40 Desc  
Main Document Page 1 of 7



1 PETER C. ANDERSON  
UNITED STATES TRUSTEE  
2 JILL M. STURTEVANT, State Bar No. 089395  
ASSISTANT UNITED STATES TRUSTEE  
3 DARE LAW, State Bar No. 155714  
HATTY YIP, State Bar No. 246487  
4 TRIAL ATTORNEY  
OFFICE OF THE UNITED STATES TRUSTEE  
5 725 South Figueroa Street, Suite 2600  
Los Angeles, California 90017-5418  
6 (213) 894-4925 telephone  
(213) 894-2603 facsimile  
7 Email: dare.law@usdoj.gov

8  
9 UNITED STATES BANKRUPTCY COURT  
10 CENTRAL DISTRICT OF CALIFORNIA  
11 SAN FERNANDO DIVISION

12 In re:

13 GEORGE MARCIANO,  
14 Debtor.

Case No.: 1:11-bk-10426-VK

Chapter 11

ORDER APPROVING APPOINTMENT  
OF A CHAPTER 11 TRUSTEE

[NO HEARING REQUIRED]

15  
16  
17  
18  
19 The Court having considered the United States Trustee's Application For Order Approving  
20 Appointment Of Trustee And Fixing Bond ("Application"), and for good cause appearing,

21 IT IS HEREBY ORDERED that the Application is approved.

22  
23  
24 DATED: March 11, 2011

25  
26  
27  
28  
  
United States Bankruptcy Judge

EXHIBIT 4



Case 1:11-bk-10426-VK Doc 226 Filed 03/11/11 Entered 03/11/11 09:57:40 Desc  
Main Document Page 2 of 7

NOTE: When using this form to indicate service of a proposed order, **DO NOT** list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on the CM/ECF docket.

## PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

725 South Figueroa Street, Suite 2800, Los Angeles, California 90017-1574

A true and correct copy of the foregoing document described as: **ORDER APPROVING APPOINTMENT OF A CHAPTER 11 TRUSTEE**

will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner indicated below:

I. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On n/a I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

NOT APPLICABLE

☐ Service information continued on attached page

II. **SERVED BY U.S. MAIL OR OVERNIGHT MAIL** (indicate method for each person or entity served):

On 3/10/11 I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

SEE ATTACHED SERVICE LIST (IF APPLICABLE)

☒ Service information continued on attached page

III. **SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL** (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on N/A I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on the judge will be completed no later than 24 hours after the document is filed. Upon filing I will be giving a filed document to a Court delivery service consistent with our normal business practice, with instructions to deliver the copy to the bin outside the suite (Court Manual Appendix F), as follows:

NOT APPLICABLE

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

3/10/11  
Date

SONNY FLORES  
Type Name

/s/ Sonny Flores  
Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

August 2010

F.9013-3.1.PROOF.OF.SERVICE

Case 1:11-bk-10426-VK Doc 226 Filed 03/11/11 Entered 03/11/11 09:57:40 Desc  
Main Document Page 3 of 7

**ADDITIONAL SERVICE INFORMATION**

**II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL:**

**DEBTOR:**  
**Georges Marciano**  
1000 N Crescent Drive  
Beverly Hills, CA 90210

**DEBTOR'S COUNSEL:**  
**Daniel J McCarthy**  
Hill Farrer & Burrill LLP  
300 S Grand Ave 37th Fl  
Los Angeles, CA 90071

**PETITIONING CREDITOR:**  
**Joseph Fahs**  
C/O Alain V Bonavida Esq  
499 N Canon Dr 4th Flr  
Beverly Hills, CA 90210

**CREDITOR'S COUNSEL:**  
**Bradley E Brook**  
Law Offices of Bradley E Brook  
11500 W Olympic Blvd, Ste.400  
Los Angeles, CA 90064

**PETITIONING CREDITOR:**  
**Elizabeth Tagle**  
C/O John D Guerrini Esq  
750 E Green St Ste 200  
Pasadena, CA 91101

**CREDITOR:**  
**DREIER STEIN KAHAN BROWNE WOODS GEORGE LLP**  
3305 JERUSALEM AVE STE 201  
WANTAGH NEW YORK 11793

**CREDITOR:**  
**Franchise Tax Board**  
Bankruptcy Section MS A340  
P O Box 2952  
Sacramento CA 95812-2952

**CREDITOR:**  
**INTERNAL REVENUE SERVICE**  
300 North Los Angeles Street  
M/S 5022  
Los Angeles, CA 90012

**CREDITOR:**  
**Steven Chapnick**  
C/O Michael J Partos Esq  
777 S Figueroa St Ste 2850  
Los Angeles CA 90017

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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

Case 1:11-bk-10426-VK Doc 226 Filed 03/11/11 Entered 03/11/11 09:57:40 Desc  
Main Document Page 4 of 7

**JUDGE'S COPY:**

The Honorable Victoria S. Kaufman  
Judge Kaufman's Courtesy Copy  
21041 Burbank Blvd., Ste. 354  
Woodland Hills, CA 91367

---

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

August 2010

**F.9013-3.1.PROOF.OF.SERVICE**

Case 1:11-bk-10426-VK Doc 226 Filed 03/11/11 Entered 03/11/11 09:57:40 Desc  
Main Document Page 5 of 7

**NOTE TO USERS OF THIS FORM:**

- 1) Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
- 2) The title of the judgment or order and all service information must be filed in by the party lodging the order.
- 3) **Category I, below:** The United States trustee and case trustee (if any) will always be in this category.
- 4) **Category II, below:** List **ONLY** addresses for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. **DO NOT** list an address if person/entity is listed in category I.

**NOTICE OF ENTERED ORDER AND SERVICE LIST**

Notice is given by the court that a judgment or order entitled (specify): **ORDER APPROVING APPOINTMENT OF A CHAPTER 11 TRUSTEE**

was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

**I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of 3/10/11, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

Bradley E Brook bbrook@bbrooklaw.com, jimmy@bbrooklaw.com; brookecfmail@gmail.com  
Peter A Davidson pdavidson@ecjlaw.com  
Dare Law dare.law@usdoj.gov  
Daniel J McCarthy dmccarthy@hillfarrer.com  
S Margaux Ross margaux.ross@usdoj.gov  
Anthony J Rothman anthony@arothmanlaw.com  
Kenneth N Russak krussak@frandzel.com, efilng@frandzel.com; ltokubo@frandzel.com  
Richard Seegman rseegman@wolfgrouppla.com, kmanning@wolfgrouppla.com; ltarring@wolfgrouppla.com  
Ramesh Singh claims@recoverycorp.com  
United States Trustee (SV) ustpreion16.wh.ecf@usdoj.gov

☐ Service information continued on attached page

**II. SERVED BY THE COURT VIA U.S. MAIL:** A copy of this notice and a true copy of this judgment or order was sent by United States Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

**SEE ATTACHED SERVICE LIST (IF APPLICABLE)**

☒ Service information continued on attached page

**III. TO BE SERVED BY THE LODGING PARTY:** Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated below:

**NOT APPLICABLE**

☐ Service information continued on attached page

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

August 2010

**F 9021-1.1.NOTICE.ENTERED.ORDER**

Case 1:11-bk-10426-VK Doc 226 Filed 03/11/11 Entered 03/11/11 09:57:40 Desc  
Main Document Page 6 of 7

**ADDITIONAL SERVICE INFORMATION**

**II. SERVED BY THE COURT VIA U.S. MAIL:**

**DEBTOR:**

**Georges Marclano**  
1000 N Crescent Drive  
Beverly Hills, CA 90210

**DEBTOR'S COUNSEL:**

**Daniel J McCarthy**  
Hill Farrer & Burrill LLP  
300 S Grand Ave 37th Fl  
Los Angeles, CA 90071

**PETITIONING CREDITOR:**

**Joseph Fahs**  
C/O Alain V Bonavida Esq  
499 N Canon Dr 4th Flr  
Beverly Hills, CA 90210

**CREDITOR'S COUNSEL:**

**Bradley E Brook**  
Law Offices of Bradley E Brook  
11500 W Olympic Blvd, Ste.400  
Los Angeles, CA 90064

**PETITIONING CREDITOR:**

**Elizabeth Tagle**  
C/O John D Guerrini Esq  
750 E Green St Ste 200  
Pasadena, CA 91101

**CREDITOR:**

**DREIER STEIN KAHAN BROWNE WOODS GEORGE LLP**  
3305 JERUSALEM AVE STE 201  
WANTAGH NEW YORK 11793

**CREDITOR:**

**Franchise Tax Board**  
Bankruptcy Section MS A340  
P O Box 2952  
Sacramento CA 95812-2952

**CREDITOR:**

**INTERNAL REVENUE SERVICE**  
300 North Los Angeles Street  
M/S 5022  
Los Angeles, CA 90012

---

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

August 2010

**F 9021-1.1.NOTICE.ENTERED.ORDER**

Case 1:11-bk-10426-VK Doc 226 Filed 03/11/11 Entered 03/11/11 09:57:40 Desc  
Main Document Page 7 of 7

**CREDITOR:**  
**Steven Chapnick**  
**C/O Michael J Partos Esq**  
**777 S Figueroa St Ste 2850**  
**Los Angeles CA 90017**

---

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

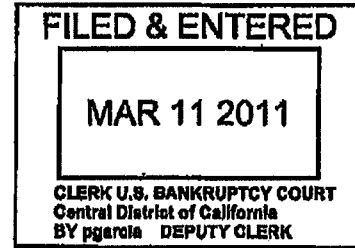
August 2010

**F.9013-3.1.PROOF.OF.SERVICE**

**EXHIBIT 5**



Case 1:11-bk-10426-VK Doc 228 Filed 03/11/11 Entered 03/11/11 10:23:45 Desc  
Main Document Page 1 of 5



**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA**

In re:  
Georges Marciano,

Case No: 1:11-bk-10426-VK

Chapter: 11

ORDER DENYING MOTION FOR TEMPORARY  
STAY AND FOR STAY PENDING APPEAL OF  
ORDER DIRECTING THE APPOINTMENT OF A  
CHAPTER 11 TRUSTEE

Debtor(s).

Date:  
Time:  
Location:

On March 10, 2011, Georges Marciano, the debtor in the above-captioned bankruptcy case ("Debtor"), filed an Application for Order Setting Hearing on Shortened Notice ("Application") and A Motion for Temporary Stay and For Stay Pending Appeal of Order Directing the Appointment of a Chapter 11 Trustee ("Motion"). The Court in a separate order denied the Application.

The Court has taken note of the Order of the Ninth Circuit Bankruptcy Appellate Panel, filed on February 9, 2011, and the Order of the Ninth Circuit Court of Appeals, filed on February 24, 2011, both of which deny Debtor's motion for a stay pending appeal of the entry of the order for relief in this case, entered on December 28, 2010. In addition, the Court has reviewed the Motion. With respect to the Court's order directing the appointment of a chapter 11 trustee, Debtor has not demonstrated that he is entitled to a temporary stay or stay pending appeal under the factors enunciated in In re Wymer, 5 B.R.

Case 1:11-bk-10426-VK Doc 228 Filed 03/11/11 Entered 03/11/11 10:23:45 Desc  
Main Document Page 2 of 5

1 802 (9<sup>th</sup> Cir. BAP 1980). In particular, it appears that: (1) Debtor is not likely to succeed on the merits  
2 of the appeal; (2) Debtor will not suffer irreparable injury absent a stay; (3) the stay would prejudice the  
3 appellees; and (4) the stay would do harm to the public interest. Accordingly, the Motion is hereby  
4 ORDERED DENIED.  
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DATED: March 11, 2011

  
United States Bankruptcy Judge

Case 1:11-bk-10426-VK Doc 228 Filed 03/11/11 Entered 03/11/11 10:23:45 Desc  
Main Document Page 3 of 5

**NOTE TO USERS OF THIS FORM:**

- 1) Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
- 2) The title of the judgment or order and all service information must be filled in by the party lodging the order.
- 3) Category I. below: The United States trustee and case trustee (if any) will always be in this category.
- 4) Category II. below: List ONLY addresses for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. DO NOT list an address if person/entity is listed in category I.

**NOTICE OF ENTERED ORDER AND SERVICE LIST**

Notice is given by the court that a judgment or order entitled (*specify*) **ORDER DENYING MOTION FOR TEMPORARY STAY AND FOR STAY PENDING APPEAL OF ORDER DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

**I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of \_\_\_\_\_, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

☒ Service information continued on attached page

**II. SERVED BY THE COURT VIA U.S. MAIL:** A copy of this notice and a true copy of this judgment or order was sent by U.S. Mail to the following person(s) and/or entity(ies) at the address(es) indicated below:

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**EXHIBIT 6**

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Attorneys for Chapter 11 Debtor  
**GEORGES MARCIANO**

**UNITED STATES BANKRUPTCY COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**  
**SAN FERNANDO VALLEY DIVISION**

In re  
**GEORGES MARCIANO,**  
  
Debtor.

CASE NO. 1:11-bk-10426-VK

Chapter 11

**MOTION FOR TEMPORARY STAY AND  
FOR STAY PENDING APPEAL OF  
ORDER DIRECTING THE  
APPOINTMENT OF A CHAPTER 11  
TRUSTEE; MEMORANDUM OF POINTS  
AND AUTHORITIES; DECLARATION OF  
DANIEL J. MCCARTHY**

DATE: [To Be Set]  
TIME: [To Be Set]  
CTRM: 301

**TO: THE HONORABLE VICTORIA S. KAUFMAN, UNITED STATES  
BANKRUPTCY JUDGE, AND ALL PARTIES IN INTEREST AND THEIR  
ATTORNEY(S) OF RECORD:**

**PLEASE TAKE NOTICE** that on such date and time as the Court may set after  
reviewing this Motion, which date and time will be the subject of further notice, in Courtroom  
301 of the San Fernando Valley Division of the above-entitled Court, located at 21041 Burbank  
Boulevard, Woodland Hills, California 91367, the "Motion for Temporary Stay and for Stay

**EXHIBIT 6**



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1 Pending Appeal of Order Directing the Appointment of a Chapter 11 Trustee" (the "Motion") of  
2 Chapter 11 debtor Georges Marciano will come on for hearing. By that Motion, Mr. Marciano  
3 will request that the Court stay its "Order Directing the Appointment of a Chapter 11 Trustee"  
4 which was entered on March 7, 2011 (the "March 7 Order") [dkt. no. 221]. More specifically,  
5 Mr. Marciano respectfully requests that the Court permanently stay the March 7 Order pending  
6 the resolution of the appeal from that order pursuant to F.R.B.P. 8005 and F.R.C.P. 62. That  
7 appeal was filed on March 8, 2011. Alternatively, if a permanent stay is not promptly granted,  
8 Mr. Marciano requests a temporary 30-day stay of the March 7 Order to provide him time to seek  
9 a stay pending appeal from this Court and, if necessary, from the appellate court and to provide  
10 this Court and the appellate court time to rule upon the request.

11 The Motion will be brought pursuant to Federal Rule of Bankruptcy Procedure 8005;  
12 Federal Rule of Civil Procedure 62, as made applicable by Federal Rule of Bankruptcy Procedure  
13 7062; and the Court's inherent authority. Mr. Marciano will request a permanent stay of the  
14 pending appeal and he will request a 30 day temporary stay pending appeal to give the parties  
15 time to seek a stay pending appeal from this Court and from the appellate court.

16 Opposition, if any, to the Motion is required to be served and filed in compliance with  
17 applicable rules, including the Court's Local Bankruptcy Rules, in such manner as the Court may  
18 direct.

19  
20 DATED: March 10, 2011

HILL, FARRER & BURRILL LLP

21

22

By: /s/ Daniel J. McCarthy  
DANIEL J. MCCARTHY  
Attorneys for Chapter 11 Debtor  
GEORGES MARCIANO

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**  
**MOTION FOR TEMPORARY STAY AND FOR STAY PENDING APPEAL OF ORDER**  
**DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE**

**I. INTRODUCTION.**

**A. Brief Procedural History.**

On December 28, 2010, the Court entered its "Order (1) Granting Petitioning Creditors' Motion for Summary Judgment for the Entry of an Order for Relief Under Chapter 11 of Title 11 of the United States Code against Georges Marciano, and (2) Denying Georges Marciano's Cross-Motion for Summary Judgment" [dkt. no. 159] and also entered the related "Order for Relief in the Instant Title 11 Case Against Georges Marciano" [dkt. no. 161] (collectively, the "December 28 Orders"). On December 28, 2010, the Court also entered its 31-page Memorandum of Decision. [Dkt. no. 160.]

On December 29, 2010, the Court entered its "Order Denying Motion for Reconsideration of Order Denying Motion to Dismiss or Stay Involuntary Chapter 11 Case." [Dkt. No. 164]. By that Order, it denied Mr. Marciano's motion for reconsideration of the Court's prior order denying his motion to stay the case under 11 U.S.C. § 305(a), which had been filed on July 8, 2010. [Dkt. no. 105.]

On December 29, 2010, Mr. Marciano filed two documents. One was a motion for reconsideration of the Court's December 28 Orders granting petitioning creditors' motion for summary judgment, denying Mr. Marciano's cross-motion, and issuing an order for relief, and the related Memorandum of Decision. [Dkt. no. 162.] The second was an ex parte application for a 30-day temporary stay of the order for relief to allow the motion for reconsideration to be determined and, if denied, to allow a motion for stay pending appeal to be determined. [Dkt. no. 163.]

On January 6, 2011, Mr. Marciano filed a motion for reconsideration [dkt. no. 171] regarding the Court's December 29, 2010 order [dkt. no. 164] denying his prior motion for reconsideration of the Court's order denying his motion to stay the case under 11 U.S.C. § 305(a).

Mr. Marciano's two motions for reconsideration were denied by orders entered on January

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1 10, 2011. [Dkt. nos. 179 and 180.] The ex parte application for a temporary 30-day stay  
2 impliedly was ruled upon on January 24, 2011, as part of an order partially granting a similar  
3 motion, as described below.

4 On January 4, 2011, Mr. Marciano filed a notice of appeal from the December 28 Orders;  
5 the related December 28 Memorandum of Decision; the December 29 order denying the July 8  
6 motion for reconsideration; and four prior interlocutory orders that became subject to appeal upon  
7 entry of the order for relief. [Dkt. no. 169.] The appeal was referred to the Bankruptcy Appellate  
8 Panel ("BAP") on January 5, 2011 [dkt. no. 170], and it has been docketed as BAP case no. 11-  
9 1008. Mr. Marciano's opening brief was due on February 22, 2011, and was filed on that date.

10 On January 10, 2011, Mr. Marciano filed an amended notice of appeal [dkt. no. 181] that  
11 added the two January 10, 2011 orders.

12 On January 11, 2011, Mr. Marciano filed an emergency motion requesting that the Court  
13 extend Mr. Marciano's time by 30 days to file his schedules, statement of financial affairs, etc.,  
14 and to otherwise comply with applicable requirements. [Dkt. no. 182.] On January 11, 2011, the  
15 Court issued an order extending his time for 14 days until January 25, 2011. [Dkt. no. 185 in case  
16 no. 09-39630.]

17 On January 11, 2011, Mr. Marciano filed an emergency motion with this Court by which  
18 he again requested that the Court issue a 30-day temporary stay of the December 28 Orders. By  
19 that motion Mr. Marciano also requested a suspension of the case under 11 U.S.C. § 305(a), now  
20 that the order for relief had been entered, and a stay pending appeal of the December 28 Orders.  
21 The motion was heard and denied on January 24, 2011. On January 25, 2011, the Court issued a  
22 temporary stay to enable Mr. Marciano to seek a stay pending appeal from the BAP or from the  
23 District Court, if the appeal was transferred there. [Docket no. 205.] In granting the temporary  
24 30-day stay, the Bankruptcy Court acknowledged the "unsettled" state of the law on issues of first  
25 impression, but the Court declined to issue a stay of the December 28 Orders pending appeal  
26 pursuant to Rule 8005, choosing instead to leave that determination to the Bankruptcy Appellate  
27 Panel.

28 On January 25, 2011, the Bankruptcy Court also issued an order extending Mr.



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1 Marciano's time to file his schedules, statement of financial affairs and other documents required  
2 by applicable law until the earlier of 7 days after the termination of the temporary stay or 7 days  
3 after the BAP or District Court denied a stay pending appeal. [Dkt. no. 203.] Given that the stay  
4 was denied by the BAP on February 9, the extended due date was February 16, 2011, unless the  
5 Ninth Circuit entered a stay pending appeal.

6 On January 27, 2011, Mr. Marciano filed an emergency motion with the BAP by which he  
7 requested that the Court issue a stay of the December 28 Orders pending appeal. On February 9,  
8 the BAP issued its order denying the emergency motion.

9 On February 8, 2011, Mr. Marciano filed a second amended notice of appeal with the  
10 Bankruptcy Court [dkt. no. 209], which added the January 25 "Order Granting Temporary Stay,  
11 But Denying Stay Pending Appeal of (1) Order Granting Petitioning Creditors' Motion for  
12 Summary Judgment, and (2) Order for Relief" [docket no. 205], which was entered on January  
13 25, 2011.

14 On February 10, 2011, Mr. Marciano filed a notice of appeal of the BAP's February 9  
15 order and then prepared the emergency motion for stay pending appeal to file with the Ninth  
16 Circuit. The BAP delayed in referring the appeal to the Ninth Circuit until February 17, and then  
17 the next morning on February 18 it was assigned a case number. Later that day, Mr. Marciano  
18 filed emergency motion for a stay and a supporting appendix and declaration with the Ninth  
19 Circuit.

20 On February 24, 2011, the Ninth Circuit issued an order denying the stay motion filed  
21 with it. The order also ordered Mr. Marciano to file a response within 21 days showing that the  
22 Ninth Circuit had jurisdiction over the appeal, which its order stated it did not think it had. Mr.  
23 Marciano will be filing the brief required by the Court and a renewed request that the Ninth  
24 Circuit issued stay pending appeal due to the fact that it has jurisdiction over the appeal from the  
25 BAP's order denying a motion for stay pending appeal.

26 On March 1, 2011, certain creditors filed a motion for appointment of a Chapter 11 trustee  
27 and a related application for order shortening time for hearing on the motion. [Dkt. no. 213.] On  
28 March 2, 2011, the Court set the motion for hearing on March 4, 2011. [Dkt. no. 214.] The

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1 motion was joined by the U.S. Trustee and the petitioning creditors. Dkt. nos. 217 and 219.]

2 Over Mr. Marciano's opposition [dkt. no. 218], the motion was granted at hearing on March 4.

3 On March 7, the Court entered its "Order Directing the Appointment of a Chapter 11 Trustee"

4 [dkt. no. 221] (the "March 7 Order"), which is the subject of this Motion.

5 On March 8, 2011, Mr. Marciano filed an appeal from the March 7, 2011 Order. [Dkt. no.  
6 222.]

7 **B. Summary of Argument.**

8 When Mr. Marciano's time to file schedules and comply with other requirements ran, he  
9 was faced with an impossible choice. In order to avoid a potential appointment of a trustee or  
10 conversion of his case to one under Chapter 7, he could irreparably harm his privacy rights by  
11 providing full disclosure of his financial condition, or he could refuse to irreparably harm those  
12 rights and risk the appointment of a trustee. He chose the latter course, and the Court responded  
13 by ordering the appointment of a Chapter 11 trustee.

14 The March 7 Order should be stayed pending appeal pursuant to F.R.B.P. 8005. First, Mr.  
15 Marciano is likely to prevail in the appeal. The appointment of a trustee on less than 48 hours  
16 notice due to the non-filing of schedules and other non-compliance with applicable requirements  
17 for 16 days from February 16, when the stay expired, to March 4, when the hearing occurred, was  
18 an undue punishment for Mr. Marciano's decision to protect his privacy rights. A trustee should  
19 not have been appointed for three reasons: (a) the best interests of creditors and the estate will not  
20 be served under 11 U.S.C. § 1104(a)(2) and (3) by a trustee who will run up huge costs and who  
21 is not likely to discover and report any significant financial information by the time the expedited  
22 appeal to the BAP from the order for relief is over; (b) that is especially true given that the ability  
23 of the trustee and the professionals employed by him to be paid is at risk due to the possibility  
24 that the BAP will reverse the order for relief and the State Court of Appeal will reverse the  
25 default judgments that the involuntary filing was based upon; and (c) under applicable law, the  
26 mere short-term non-disclosure of financial condition is not sufficient grounds for a trustee  
27 without a showing of dishonesty or incompetence in the nature of "fraud, dishonesty,  
28 incompetence, or gross mismanagement" by Mr. Marciano under 11 U.S.C. § 1104(a)(1).

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1 Second, a trustee will cause the exact type of irreparable harm that caused the Ninth  
2 Circuit in *In re Mason*, 709 F.2d 1313 (9th Cir. 1983), to conclude that orders for relief are  
3 immediately appealable. He will be deprived of control of his assets and huge administrative  
4 expenses will be incurred. That is particularly inappropriate given that the order for relief is on  
5 expedited appeal to the BAP.

6 Third, no substantial harm will come to the creditors from a stay pending appeal. The  
7 creditors still have never demonstrated that Mr. Marciano's is diverting or concealing assets.

8 Fourth, public policy would be served by a stay pending appeal, rather than harmed.  
9 Potentially unnecessary costs and judicial resources would not be incurred, unless Mr. Marciano  
10 loses his appeal from the order for relief and the order appointing a trustee.

11 **II. AT A MINIMUM, A 30-DAY TEMPORARY STAY PENDING APPEAL SHOULD**  
12 **BE ISSUED.**

13 Mr. Marciano is filing this motion seeking a stay pending appeal, which will need to be  
14 ruled upon by this Court. The creditors presumably will want time to file an opposition to this  
15 motion. Should this Court deny this motion, Mr. Marciano will bring a stay motion before the  
16 BAP. Those motions will take time to be determined.

17 Further, without the issuance of a temporary stay, a Chapter 11 trustee will need to  
18 commence the fulfillment of his statutory duties, which probably will mean hiring counsel and  
19 accountants.

20 There is ample authority for a temporary 30-day stay under the Court's inherent authority.  
21 In *Ohanian v. Irwin (In re Irwin)*, 338 B.R. 839, 844-845 (E.D. Cal. 2006), the Court described  
22 the factors to be considered under Rule 8005 in connection with a motion for stay pending appeal.  
23 The Court noted that the Bankruptcy Court had granted a temporary stay based upon these  
24 concerns:

25 "On August 31, 2005, Judge Rimel said 'I'm inclined to grant a temporary stay for  
26 thirty days to allow the appellant to go to District Court and seek a stay -- any  
27 further extent of a stay. That solves the rush to the courthouse problem, keeps the  
28 parties in the same position they are now, and you can ask the District Court who  
has the appeal pending before it if the District Court thinks the stay is  
reasonable.'" [Emphasis added.]

1 Accord, *SS Farms, LLC v. Sharp (In re SK Foods, L.P.)*, 2010 U.S. Dist. LEXIS 46920,  
2 \*5 (E.D. Cal. May 11, 2010) [Bankruptcy Court granted and then extended a temporary stay to  
3 allow the motion for stay pending appeal to be "normally heard . . . and decided thereafter." ]

4 Similar to Judge Rimel's ruling in *In re Irwin*, a temporary stay in this case "solves the  
5 rush to the courthouse problem, keeps the parties in the same position they are now," and gives  
6 Mr. Marciano time to "ask the District Court" or the BAP, who will have "the appeal pending  
7 before it if [it] thinks the stay is reasonable."

8 **III. THE MARCH 7 ORDER SHOULD BE STAYED PENDING APPEAL.**

9 **A. The March 7 Order Should Be Stayed Pursuant To F.R.B.P. 8005.**

10 **1. The Standard.**

11 A stay pending appeal is governed by Federal Rule of Bankruptcy Procedure 8005, which  
12 states:

13 "A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for  
14 approval of a supersedeas bond, or for other relief pending appeal must ordinarily  
15 be presented to the bankruptcy judge in the first instance. Notwithstanding Rule  
16 7062 but subject to the power of the district court and the bankruptcy appellate  
17 panel reserved hereinafter, the bankruptcy judge may suspend or order the  
18 continuation of other proceedings in the case under the Code or make any other  
19 appropriate order during the pendency of an appeal on such terms as will protect  
20 the rights of all parties in interest. A motion for such relief, or for modification or  
21 termination of relief granted by a bankruptcy judge, may be made to the district  
22 court or the bankruptcy appellate panel, but the motion shall show why the relief,  
23 modification, or termination was not obtained from the bankruptcy judge. The  
24 district court or the bankruptcy appellate panel may condition the relief it grants  
25 under this rule on the filing of a bond or other appropriate security with the  
26 bankruptcy court. When an appeal is taken by a trustee, a bond or other  
27 appropriate security may be required, but when an appeal is taken by the United  
28 States or an officer or agency thereof or by direction of any department of the  
Government of the United States a bond or other security shall not be required."  
[Emphasis added]

23 The standards governing the issuance of a stay pending appeal under Rule 8005 were  
24 noted in *Ohanian v. Irwin (In re Irwin)*, 338 B.R. 839, 843 (E.D. Cal. 2006), as follows:

25 "An appellant seeking a discretionary stay pending appeal under  
26 Bankruptcy Rule 8005 must prove: (1) appellant is likely to succeed on the merits  
27 of the appeal; (2) appellant will suffer irreparable injury; (3) no substantial harm  
28 will come to appellee; and (4) the stay will do no harm to the public interest."  
*Universal Life Church v. United States*, 191 B.R. 433, 444 (E.D. Cal. 1995)."

Accord, *SS Farms, LLC v. Sharp (In re SK Foods, L.P.)*, 2010 U.S. Dist. LEXIS 46920,

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\*6 (B.D. Cal. May 11, 2010) [citing *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)]; *Zamora v. Virtue (In re Cont'l Coin Corp.)*, 2009 U.S. Dist. LEXIS 74392 (C.D. Cal. Aug. 21, 2009)). As set forth below, these standards are met in this case.

**2. Application Of The Factors.**

**a. Success On The Merits Of The Appeal.**

**(1) A Trustee Is Not In The "Interests" Of All Parties At This Stage Under 11 U.S.C. §§ 1104(a)(2) and (3).**

Through counsel, Mr. Marciano emphasized the extraordinary nature of the remedy of a trustee at hearing on March 4. The moving creditors even conceded that. *Adams v. Marwil (In re Bayou Group, LLC)*, 564 F.3d 541, 546 (2d Cir. 2009) ["appointment of a trustee in a Chapter 11 case is an 'extraordinary' remedy."] At hearing on March 4, however, the Court did not appear to weigh the extraordinary nature of the remedy of a trustee against what a trustee would accomplish, although such a weighing is necessary, as noted by the Court in *Cajun Elec. Power Coop. v. Central La. Elec. Co. (In re Cajun Elec. Power Coop.)*, 69 F.3d 746, 749 (5th Cir. 1995):

"The appointment of a trustee pursuant to Section 1104(a)(1) is an extraordinary remedy, and there is a strong presumption that the debtor should be permitted to remain in possession absent a showing of need for the appointment of a trustee." [Emphasis added.]

It is not enough to find that financial reporting has not occurred by Mr. Marciano. Instead, there must be a "need" for a trustee, which presupposes that the trustee is likely to accomplish something beneficial for all concerned parties.

At the March 4 hearing, the Court relied on 11 U.S.C. § 1104(a)(1) in finding "cause" for the appointment of a trustee, but it did find not "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor." Although not specifically articulated, the "cause" was the need to have someone (now a trustee) investigating the "acts, conduct, assets, liabilities, and financial condition of the debtor" under 11 U.S.C. § 1106(a)(3), and filing schedules, a statement of financial affairs, a creditor list and related documents under 11 U.S.C. § 1106(a)(2), since Mr. Marciano had not yet done so. At the request of the U.S. Trustee in its joinder, which



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1 the Court declined to strike, the Court also relied upon 11 U.S.C. § 1104(a)(3), which cross-  
2 references the grounds for conversion of dismissal under § 1112 and permits the appointment of a  
3 trustee if "the court determines that the appointment of a trustee or examiner is in the best  
4 interests of creditors and the estate." Section 1112(b)(4)(F) in turn includes an "unexcused  
5 failure to satisfy timely any filing or reporting requirement established by this title or by any rule  
6 applicable to a case under this chapter."

7 In essence, the Court held that if Mr. Marciano was not going to disclose his private  
8 financial information until he had a ruling from the BAP in his pending appeal from the  
9 December 28 Orders, it was going to appoint a trustee to see whether the trustee could find that  
10 financial information, as if there is an urgent need for it at this point. This determination was  
11 incorrect under 11 U.S.C. §§ 1104(a)(2) and (3).

12 Through counsel, Mr. Marciano asked the Court at the March 4 hearing about the practical  
13 consequences of the appointment of a trustee, given that Mr. Marciano is standing on his  
14 constitutional right of privacy. Simply stated, how soon -- if ever -- can a trustee assemble the  
15 information necessary to ascertain and disclose the detailed aspects of Mr. Marciano's financial  
16 condition, if Mr. Marciano does not provide that information to the trustee?

17 The remedy imposed by the Court is required to be in the "best interests of creditors and  
18 the estate" under § 1104(a)(3). Section 1104(a)(2), which the creditors invoked in their motion,  
19 similarly applies a standard of "the interests of creditors, any equity security holders, and other  
20 interests of the estate," rather than simply focusing on creditors. By the time the expedited appeal  
21 to the BAP is over, a trustee cannot reasonably be expected to discover and disclose Mr.  
22 Marciano's financial information in fulfilling his or her duties in any reliable manner. How will  
23 the "best interests of creditors and the estate" be served by a trustee who will incur great expense  
24 and who is likely to have little to show for it, simply because the creditors do not want to wait for  
25 the ruling from the BAP?

26 The point is that the appointment of a trustee at this time is not in the "best interests of  
27 creditors and the estate." It will result in huge costs, but to what practical end? When Mr.  
28 Marciano first asked the Court at hearing in July 2010 to suspend the case under 11 U.S.C. §

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1 305(a), he predicted that huge expense would be incurred by the creditors and by himself and that  
2 significant judicial resources would be spent on the involuntary case, if the Court did not stay the  
3 case pending the resolution of the State Court appeals. The Court denied Mr. Marciano's motion,  
4 and huge expenses and judicial resources were incurred.

5 When the order for relief was entered, Mr. Marciano renewed his motion under § 305(a).  
6 Again, he predicted that huge expense and judicial resources would be needlessly incurred, but  
7 his renewed motion was denied, and now those expenses and resources are being spent at an  
8 alarming rate. However, the rate at which they will be spent will increase exponentially as a  
9 trustee, the trustee's counsel, the trustee's accountants and the trustee's investigators commence  
10 the fulfillment of their statutory duties. This factor has been emphasized. In *Adams v. Marwil (In*  
11 *re Bayou Group, LLC)*, 564 F.3d 541, 546-547 (2d Cir. 2009), the Court noted:

12 "In determining whether a § 1104 appointment is warranted or in the best interests  
13 of creditors, the bankruptcy court must bear in mind that the appointment of a  
14 trustee 'may impose a substantial financial burden on a hard pressed debtor  
15 seeking relief under the Bankruptcy Code,' by incurring the expenditure of  
16 'substantial administrative expenses' caused by further delay in the bankruptcy  
17 proceedings. See *Midlantic Nat'l Bank v. Anchorage Boat Sales, Inc. (In re*  
18 *Anchorage Boat Sales, Inc.)*, 4 B.R. 635, 644 (Bankr. S.D.N.Y. 1980)."

17 The same could be said in this case. The specter of huge expenditures of monies and judicial  
18 resources is not overstated.

19 Finally, the unfortunate fact is that the Court now has placed the trustee and his  
20 professionals in an impossible position. What will happen if the BAP reverses the order for  
21 relief, thereby mooted the appointment of the Chapter 11 trustee based upon the premises that (1)  
22 the order for relief was properly entered; (2) Mr. Marciano should have filed schedules and  
23 otherwise comply with applicable debtor in possession requirements; and (3) his failure to do so  
24 warranted a trustee? In all likelihood, the trustee will be dismissed at that point. And what will  
25 happen if the State Court appeals reverse the default judgments of the petitioning creditors and  
26 the five creditors represented by Peter Davidson of Brvin, Cohen & Jessup LLP? The bankruptcy  
27 should be dismissed at that point. The Court has placed the trustee and the trustee's professionals  
28 in the unfortunate position of having to incur very large fees and expenses, even though there is a



1 possibility (indeed, a probability) that they will never be paid. It must be kept in mind that the  
2 petitioning creditors and the other five creditors represented by Mr. Davidson have never argued  
3 that Mr. Marciano will lose the appeals. They never have contradicted his showing in that regard.

4 In *In re Focus Media, Inc.*, 378 F.3d 916 (9th Cir. 2004), for example, the creditors argued  
5 that the debtor's appeal from an order for relief was moot because the effect of the order could  
6 not be undone. The Court disagreed, finding that fees paid to the creditors' counsel could be  
7 ordered disgorged. *Id.*, at 924. If the trustee and the trustee's professionals have received any  
8 monies, that exact same result could occur in this case. But the more likely result will be that  
9 such uncertainty will cause them not to be quick to undertake huge expenses that may never be  
10 paid. That, of course, means that there will be little beneficial consequence to appointing a  
11 trustee at this time and, more importantly, that the appointment will not be in the "best interests of  
12 creditors and the estate."

13 In summary, appointment of a trustee was not in the best interests of the creditors and the  
14 estate under 11 U.S.C. §§ 1104(a)(2) and (3). A trustee and the professionals hired by him will  
15 be very expensive, if they try to fulfill their statutory duties, and it is highly unlikely the trustee  
16 will be able to meet his or her obligations in filing schedules, a statement of financial affairs, a  
17 creditor list, etc., especially by the time Mr. Marciano's appeal to the BAP from the order for  
18 relief is over. Practically speaking, a trustee will accomplish little, if anything, and a trustee will  
19 cause great expenses, that may be entirely unnecessary, and to what end? There has been no  
20 showing of an imminent need for Mr. Marciano's financial information.

21 (2) No "Cause" Was Shown Under 11 U.S.C. § 1104(a)(1).

22 Section 1104(a)(1) authorizes the appointment of a trustee:

23 "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of  
24 the affairs of the debtor by current management, either before or after the  
25 commencement of the case, or similar cause, but not including the number of  
26 holders of securities of the debtor or the amount of assets or liabilities of the  
27 debtor;...."

27 The use of the word "including" admittedly means that "dishonesty, incompetence, or  
28 gross mismanagement of the affairs of the debtor" is not an exclusive list of what constitutes

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1 "cause" under § 1104(a)(1), but it is interpreted keeping in mind that: "[T]he standard for § 1104  
2 appointment is very high." *Adams v. Marwil (In re Bayou Group, LLC)*, 564 F.3d at 546  
3 [finding that "the U.S. Trustee has not met the 'very high' standard for a § 1104 appointment. The  
4 U.S. Trustee has not attempted to show that [debtor] has engaged in 'fraud, dishonesty,  
5 incompetence, or gross mismanagement.'"]

6 Although a flexible concept, the Court stretched the notion of "cause" way beyond its  
7 limits. It must be in the nature of incompetence or dishonesty, but there was no showing of that  
8 by the moving parties and no finding of that by the Court on March 4. In affirming the denial of a  
9 trustee, the Court in *Schuster v. Dragone*, 266 B.R. 268, 272 (D. Conn. 2001), explained that  
10 there must be dishonesty or mismanagement that is more than simple mismanagement:

11 "Under subsection (1), the Bankruptcy Court's discretion is limited to a  
12 determination of whether 'cause' exists for such appointment, and such 'cause'  
13 must be in the nature of 'fraud, dishonesty, incompetence, or gross  
14 mismanagement' of the debtor by current management, either before or after the  
15 commencement of the case. "The concepts of incompetence and dishonesty cover a  
16 wide spectrum of conduct and . . . the court has broad discretion in applying such  
17 concepts to show cause." *Dalkon Shield Claimants*, 828 F.2d at 241. Implicit in a  
18 finding of fraud, incompetence, or dishonesty, for purposes of subsection (1) is  
19 whether the evidence of the misconduct rises to a level sufficient to warrant the  
20 appointment of a trustee. *In re General Oil Distribs.*, 42 B.R. at 408-09. Moreover,  
21 'since one would expect to find some degree of incompetence or mismanagement  
22 in most businesses which have been forced to seek the protection of chapter 11, the  
23 Court must find something more aggravated than simple mismanagement in order  
24 to appoint a trustee.' *In re Clinton Centrifuge*, 85 B.R. at 983-84; *In re Anchorage*  
25 *Boat Sales, Inc.*, 4 B.R. 635, 644-45 (Bankr. E.D.N.Y. 1980)."

26 This Court's holding that the mere failure to file financial information and make financial  
27 disclosures is not "in the nature of 'fraud, dishonesty, incompetence, or gross mismanagement' of  
28 the debtor by current management." As such, this Court improperly decided at hearing on March  
4 that there was cause for appointment of a trustee. See also, *Altman v. Rafael Galleries, Inc. (In*  
*re Altman)*, 2000 U.S. Dist. LEXIS 16235, \*17-18 (D. Conn. July 27, 2000) ["the examples of  
conduct following the word 'including' do not constitute the entire catalogue of 'good cause,' but  
rather are only illustrative of what type of conduct may constitute cause warranting appointment  
of a trustee." (Emphasis added).]

The notion of "cause" requires much more than simply examining the debtor's behavior.

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1 It also necessarily requires the Court to look at the "big picture," including what a trustee will  
2 cost and accomplish. Those factors are discussed above under 11 U.S.C. §§ 1104(a)(2) and (3),  
3 but they also must be considered under 11 U.S.C. § 1104(a)(1), as described by the Court in  
4 *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v.*  
5 *Chinery*, 330 F.3d 548, 577 (3d Cir. 2003), which rejected the appointment of a trustee under  
6 § 1104(a)(1) because "appointing a trustee is too drastic a step," and which explained that the  
7 expense and delay of a trustee warranted that conclusion:

8 "The problem is that appointing a trustee amounts to replacing much of a debtor's  
9 high-level management, and that creates immense costs in two ways. First, there is  
10 a statutory fee (which can be substantial) to which trustees are entitled for their  
11 services. See 11 U.S.C. §§ 326(a) (setting forth fee schedule), 330(a) (setting forth  
12 trustee's right to compensation); cf. 11 U.S.C. § 1107(a) (providing that debtors-in-  
13 possession are not entitled to statutory trustee's fees). [Footnote omitted.] More  
14 important, however, is the cost implicit in replacing current management with a  
15 team that is less familiar with the debtor specifically and its market generally. . . .  
16 See Kenneth N. Klee & K. John Shaffer, *Creditors Committees Under Chapter 11*  
17 *of the Bankruptcy Code*, 44 S.C. L. Rev. 995, 1045, 1049 (1993) (observing  
18 generally that 'the incremental costs' of a trustee usually 'outweigh[] the benefits,'  
19 and that 'maximization of value rarely lies down this path.')" [Emphasis added.]

20 It is not surprising that the cost and delay of a trustee is an important consideration in  
21 assessing the "interests" of all concerned parties, as well as in finding "cause" for appointment of  
22 a trustee. This is a factor that the Court did not account for at the March 4 hearing.

23 The cases cited by the moving creditors in their motion for appointment of a trustee were  
24 instructive on the issue of whether the non-filing of schedules and reports constituted "cause" to  
25 appoint a trustee because they showed two things: (1) that a trustee may be appointed after a  
26 relatively long period of misconduct; and (2) much more than a mere short-term lack of financial  
27 disclosure is required for a trustee to be appointed, and there must be dishonesty or incompetence  
28 "in the nature of 'fraud, dishonesty, incompetence, or gross mismanagement' of the debtor by  
current management." See, *In re Cohoes Industrial Terminal, Inc.*, 65 B.R. 918, 919-921 (Bankr.  
S.D.N.Y. 1986) [5 months since case filing accompanied by "no real progress in this case"; "[t]he  
debtor has been operating without fire or liability insurance for the last 9 months"; "the debtor has  
not paid post-petition rent or mortgage charges"; and "[t]he conflicts of interest in this case  
abound."]; *In re V. Savino Oil & Heating Co.*, 99 B.R. 518, 522 (Bankr. E.D.N.Y. 1989) [1 year

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from filing accompanied by the nondisclosure and "affirmative efforts to misrepresent or conceal such important matters" and post-petition transfers by the debtor without court approval under 11 U.S.C. § 363(b)); *In re Paolino*, 60 B.R. 828, 829 (E.D. Pa. 1986) and *In re Paolino*, 53 B.R. 399, 400 (Bankr. E.D. Pa. 1985) [4 months since case filing accompanied by pre-petition criminal check-kiting scheme for a half a million dollars]; *In re Ford*, 36 B.R. 501, 502 (Bankr. W.D. Ky. 1983) [9 months since case filing accompanied by two pre-petition judgments finding fraud by the debtor, plus "[f]ailure to obtain permission for the transfer of estate assets;" "[f]ailure to obtain Court permission prior to making interest-free loans from estate assets to a wholly-owned, nonparty corporation;" "[f]ailure to recognize a duty to keep estate assets separate from assets of a corporation not subject to this Court's jurisdiction;" and "[u]se of transferred assets as his own to the detriment of his personal creditors."]; and *In re Horn & Hardart Baking Co.*, 22 B.R. 668, 669 (Bankr. E.D. Pa. 1982) [1 year since filing the case accompanied by "an unexplained loss in the amount of \$127,321.00"; "the debtor has mishandled several transactions concerning the lease agreements"; "monthly operating statements which have been filed reflect a continuing operating loss"; and "the Court finds that the debtor is being mismanaged."]

In contrast, in this case the only showing made by the moving parties was a short-term failed to file schedules, the statement of financial affairs, and related documents and to comply with reporting requirements to the U.S. Trustee. As a matter of law, that was insufficient to warrant the appointment of a trustee.

#### b. Irreparable Harm To Mr. Marciano.

The very same factors that stand for the proposition that an order for relief in an involuntary bankruptcy is an appealable order, also require the conclusion that irreparable harm will occur to Mr. Marciano if a stay pending appeal is not immediately issued. As noted by the Ninth Circuit in *In re Mason*, 709 F.2d 1313, 1316, 1317 (9th Cir. 1983):

"[W]e are convinced that orders for relief should be considered final for purposes of appeal because they 'may determine and seriously affect substantive rights' and 'cause irreparable harm to the losing party if he had to wait to appeal to the end of the bankruptcy case.'" . . . [9] An order for relief, being a conclusive determination of the debtor's status as bankrupt, carries with it a great potential for irreparable injury if immediate appeal is not allowed. An order for relief effectively divests the debtor of his assets, creating an estate controlled by the

1 bankruptcy court. [Citation omitted] . . . . During the administration of the estate  
2 the debtor's rights are limited. On entry of the order for relief he loses control of  
3 his assets, which may include a business. See 11 U.S.C. § 303(f). Once property of  
the estate is liquidated there appears to be no way the debtor can force bona fide  
purchasers to return the assets. [Citations omitted]" [Emphasis added.]

4  
5 *Mason* suggests what could be irreparable harm. With the appointment of a trustee, it has  
6 come to pass. Mr. Marciano will be divested of his assets, which belong to his estate under 11  
7 U.S.C. § 541 and which will be under the control of a trustee Court absent a stay pending appeal.  
8 Further, "[d]uring the administration of the estate," Mr. Marciano's rights will be "limited" and  
9 "he loses control of his assets."

10 Further, as explained by the Court in *Zamora v. Virtue (In re Cont'l Coin Corp.)*, 2009  
11 U.S. Dist. LEXIS 74392, \*29 (C.D. Cal. Aug. 21, 2009), potential litigation costs also are a  
12 consideration in granting a stay pending appeal:

13 "[The Bankruptcy Court] also found that, without a stay, the Trustee would be  
14 harmd by the cost of litigating claims that may turn out to be non-cognizable as a  
15 matter of law. (ER 3063.) While litigation costs may not constitute irreparable  
16 harm, *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24, 94 S. Ct.  
17 1028, 1040, 39 L. Ed. 2d 123 (1974), the bankruptcy court found that allowing  
18 Virtue's case to proceed would alter the status quo and harm administration of the  
19 bankruptcy case. (ER 3063.) Moreover, the litigation costs would not be borne by  
20 the Trustee alone, but would also lead to diminution of the estate and adversely  
21 affect distribution to other creditors. (ER 3063.). . . The Court concludes that a  
22 'reasonable man [c]ould take the view adopted by the [bankruptcy court].' *In re*  
23 *Irwin*, 338 B.R. at 844. Therefore, the bankruptcy court did not abuse its discretion  
24 in issuing the stay." [Emphasis added.]

25 The same reasoning applies in this case. Like the trustee in *Continental Coin*, Mr.  
26 Marciano will have considerable expense in proceeding with the Chapter 11 case, which could be  
27 avoided if a stay is issued and the appellate court subsequently rules in favor of the appellant,  
28 who is Mr. Marciano in this case. Similarly, there will be cost to the "estate." Even if the  
appellate court decides that the involuntary stay should not have been granted under § 303 and/or  
a stay of the case should have issued under § 305(a)(1), the cost to Mr. Marciano will deplete his  
assets, *i.e.*, his "estate," even if the bankruptcy is dismissed.

27 c. No Anticipated Substantial Harm To Appellees.

28 The appellees from the order appointing the trustee are creditors and the U.S. Trustee.

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1 The creditors have succeeded in what they set out to do. An order for relief has been entered.  
2 Potential avoidance claims have been preserved, as has Mr. Marciano's estate. The "race to the  
3 court house" by the judgment creditors pursuing Mr. Marciano's assets has been prevented. A  
4 stay of the Chapter 11 case at this point will not cause any material harm, much less any  
5 "substantial harm," to the petitioning creditors because they have met their goals.

6 The petitioning creditors have speculated many times that Mr. Marciano might be doing  
7 something to render his assets unavailable. They imagine that his move to Canada in August  
8 2009 must be improperly motivated. Yet, although it has been more than 16 months since  
9 petitioning creditors filed this case, they have failed to offer a shred of evidence to support their  
10 bare speculation. They undoubtedly will argue that "substantial harm will come" to the  
11 petitioning creditors if a stay pending appeal is issued, but they have never offered any evidence  
12 to support a finding that the harm "will come," which is the standard. Instead, their speculation is  
13 that some sort of harm "might come," which does not satisfy the third criteria. And they certainly  
14 have not shown any evidence that suggests that "substantial harm" will come from a stay. Mr.  
15 Marciano is aware of no harm that will come to the petitioning creditors from a stay pending  
16 appeal.

17 Indeed, the inadmissible evidence submitted by the petitioning creditors in joining the  
18 motion for appointment of a trustee showed to the contrary. [Dkt. no. 219.] It showed that Mr.  
19 Marciano has not transferred the three real properties in Los Angeles that the petitioning creditors  
20 claim he owns through limited liability companies; that he has clearly disclosed his affiliations  
21 with Canadian entities that the petitioning creditors claim acquired properties in Montreal; and  
22 that he has hidden nothing about those transactions.

23 In such circumstances, at least one court has issued a stay pending appeal from an order  
24 for relief in an involuntary case. See, *In re Sims*, 1991 U.S. Dist. LEXIS 13664 (E.D. La. Sept.  
25 19, 1991) ["there is no suggestion that debtor's are in possession of any assets which they are  
26 attempting to hide or otherwise dispose of to other parties' detriment."] In *Sims*, there was no  
27 evidence of assets. *Id.* In this case, there is no evidence that Mr. Marciano is "attempting to hide  
28 or otherwise dispose of to other parties' detriment." As such, "no substantial harm will come to

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1 appellee" as a result of a stay.

2 d. No Harm To The Public Interest.

3 The cases discussing a stay under Rule 8005 often do not get to the last factor to discuss  
4 what "public interest" could be harmed by a stay pending appeal because appellants have failed to  
5 satisfy one or more of the first three factors. Several recent cases are instructive in demonstrating  
6 that the "public interest" would be promoted by a stay pending appeal, as opposed to being  
7 "harmed."

8 First, the Court in *SS Farms, LLC v. Sharp (In re SK Foods, L.P.)*, 2010 U.S. Dist. LEXIS  
9 46920 (E.D. Cal. May 11, 2010), addressed public interest in terms of preserving the purpose of  
10 the appeal. In that case, the appellants requested "a stay of the Bankruptcy Court's Order which  
11 gave Bankruptcy Trustee Bradley D. Sharp ("Trustee") the authorization to continue to possess  
12 and review information in his possession relating to the moving party farming entities." *Id.*, at  
13 \*2. On appeal, the District Court issued a stay pending appeal. In discussing the fourth factor, it  
14 stated: "the public interest is served in preserving the integrity of the right to appellate review  
15 since that right may be undermined if a stay is not forthcoming." \* 12. The same reasoning  
16 applies in this case. As explained above, if the trustee is allowed to proceed, what occurs can  
17 never be undone should the appellate court decided that the involuntary petition should not have  
18 been granted under 11 U.S.C. § 303(h) and/or that a stay of the involuntary case should have been  
19 issued under § 305(a).

20 Second, in *Zamora v. Virtue (In re Cont'l Coin Corp.)*, 2009 U.S. Dist. LEXIS 74392, \*30  
21 (C.D. Cal. Aug. 21, 2009), the Court addressed public interest in terms of avoiding unnecessary  
22 costs: "the bankruptcy court found that a stay was in the public interest because 'going forward  
23 with the merits of the case while an appeal is pending on the very question of what is actionable  
24 . . . would be a serious waste of time, money, and judicial resources.'" As explained above, the  
25 same is true in this case.

26 Third, in *New Cingular Servs. v. Burkart (In re Wire Comm Wireless, Inc.)*, 2008 U.S.  
27 Dist. LEXIS 58563, at \*16 (E.D. Cal. Aug. 1, 2008), the Court focuses on the impact on judicial  
28 resources: "Staying a potentially unnecessary adversary action in a bankruptcy court conserves



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1 judicial resources.” The same is true in this case. The burden of Mr. Marciano’s involuntary  
2 Chapter 11 case already has been significant to this Court. In the absence of a stay, this case will  
3 continue to demand the use of judicial resources at a time when the Bankruptcy Court’s work  
4 load is heavy.

5 Fourth, the comments of Senator Baucus quoted in the Court’s December 28  
6 Memorandum explain the policy of preventing the stigma and expense of an involuntary  
7 bankruptcy. [Dkt. no. 160, Dec. 28 Memorandum, at 18:1-2.] That policy would be promoted by  
8 a stay of the order for relief pending appeal, given that without a stay the stigma and expense to  
9 Mr. Marciano resulting from him being unwillingly forced into bankruptcy and then having a  
10 trustee appointed will be inflicted upon him.

11 Mr. Marciano acknowledges that there is a competing public interest in terms of the  
12 efficient resolution of bankruptcy proceedings and the preservation of estate assets. Courts  
13 typically throw in a statement to that effect to bolster their decision to deny a stay pending appeal,  
14 as opposed to that public interest being a determinative factor. Moreover, that interest is less  
15 relevant or not relevant in this case for at least three reasons. First, the evidence does not suggest  
16 that this interest is implicated. Again, the petitioning creditors have speculated that Bankruptcy  
17 Court supervision of the estate is necessary because Mr. Marciano might be concealing assets, but  
18 they have never offered any evidence in that regard, which is to say that there is no evidence to  
19 suggest that there is any need for the Chapter 11 case to proceed at this point. Second, as  
20 described above, the Court in *Continental Coin* noted that the goal of a matter expeditiously  
21 proceeding on its merits was outweighed by the competing interests of precluding unnecessary  
22 expense when there is an “unsettled” issue of law at stake. In this case, the issues on appeal could  
23 not be more “unsettled” in the Ninth Circuit. Accord, *Haskell v. Goldman, Sachs & Co. (In re*  
24 *Genesis Health Ventures, Inc.)*, 367 B.R. 516, 522 (Bankr. D. Del. 2007) [“While it is clearly not  
25 in the public interest to have cases languishing on court dockets for long periods of time, it is also  
26 not preferable to compel parties to go through the expense of preparing a case for trial when all of  
27 that preparation could be rendered moot by a reversal on an interlocutory appeal.”] Third, the  
28 interest of efficient resolution of bankruptcy proceedings and the preservation of estate assets is

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1 only one among many competing public interests, most of which favor a stay.

2 **B. The March 7 Order Should Be Stayed Pursuant To F.R.B.P. 7062.**

3 Bankruptcy Courts ordinarily issue stays pending appeal pursuant to F.R.B.P. 8005.

4 Alternative authority also exists under F.R.B.P. 7062, which makes F.R.C.P. 62 applicable.

5 Under F.R.B.P. 1018, F.R.B.P. 7062 applies to "all proceedings relating to a contested

6 involuntary petition," but it does not state that F.R.B.P. 8005 is inapplicable. Under F.R.C.P.

7 62(a), an 14-day automatic stay against enforcement has been in place since entry of the order for

8 relief on December 28. The test for a stay pending appeal under F.R.C.P. 62(c) is identical to the

9 test for a stay under F.R.B.P. 8005, as explained in *Hilton v. Braunskill*, 481 U.S. 770, 776

10 (1987). The discussion above regarding F.R.B.P. 8005 is equally applicable to F.R.C.P. 62, given

11 that the factors are virtually identical.

12 **IV. THE COURT LACKED JURISDICTION TO APPOINT A TRUSTEE.**

13 At hearing on March 4, the Court rejected the argument that it lacks jurisdiction to appoint

14 a trustee due to the appeal from the order for relief. Without repeating it, Mr. Marciano raises it

15 again as an additional reason why a stay pending appeal is appropriate. He incorporates herein by

16 reference the arguments he made in this regard in his opposition to the motion for appointment of

17 a trustee. [Dkt. no. 218, at 24-27.]

18 **V. CONCLUSION.**

19 The order appointing trustee in an individual Chapter 11 case is the most extraordinary

20 remedy that could have been issued against Mr. Marciano. It should not have been issued. It is

21 important that a stay be entered to be certain that Mr. Marciano is not seriously prejudiced by

22 events that will unfold at great expense, which cannot be undone.

23 Based upon the foregoing, Mr. Marciano respectfully requests that the Court permanently

24 stay its March 7 Order [dkt. no. 221] pending the resolution of the appeal from that order pursuant

25 to F.R.B.P. 8005 and F.R.C.P. 62. Alternatively, if a permanent stay is not promptly granted, Mr.

26 Marciano requests a temporary 30-day stay of the March 7 Order to provide him time to seek a

27 ///

28 ///

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1 stay pending appeal from this Court and, if necessary, from the appellate court and to provide this  
2 Court and the appellate court time to rule upon the request.

3

4 DATED: March 10, 2011

HILL, FARRER & BURRILL LLP

5

6

By: /s/ Daniel J. McCarthy

7

DANIEL J. McCARTHY  
Attorneys for Involuntary Chapter 11  
Debtor GEORGES MARCIANO

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**DECLARATION OF DANIEL J. MCCARTHY**

I, Daniel J. McCarthy, declare:

1. I am an attorney law. I am duly qualified to practice before all courts of the State of California and all federal courts in the State of California, as well as certain other courts. I was admitted to the State Bar of California in 1981, and I have been a member in good standing since then. I am a partner at the law firm of Hill, Farrer & Burrill, LLP. I am counsel of record for involuntary debtor Georges Marciano in the involuntary Chapter 11 case filed against him. I also am counsel of record in the appeal pending before the Bankruptcy Appellate Panel ("BAP") from orders of the Bankruptcy Court that were entered in that Chapter 11 case and the Ninth Circuit from the BAP's order denying a stay pending appeal.

2. Since late August 2009, I have been co-counsel for judgment debtor Georges Marciano in the cases in the Los Angeles Superior Court (the "State Court") entitled *Georges Marciano v. Joseph Fahs, et al.*, bearing case no. BC375824 (the "*Fahs* action"), and entitled *Georges Marciano, et al. v. Gary Iskowitz, et al.*, bearing case no. BC384493, which was consolidated with case no. BC385790 entitled *Gary Iskowitz, et al. v. Georges Marciano, et al.* (collectively, the "*Iskowitz* action"). Since October 2009, my firm also has been counsel of record in the appeals from the default judgments entered in the *Fahs* action and the *Iskowitz* action, and I am partially responsible for representing Mr. Marciano in connection with those appeals. The appeals in the *Fahs* action are pending before Division Two of the Second Appellate District of the California Court of Appeals, and those appeals are assigned nos. B218087, B215463, B216598 and B220011 (the "*Fahs* appeal"). The appeals in the *Iskowitz* action are pending before Division Three of the Second Appellate District of the California Court of Appeals, and those appeals are assigned nos. B216029 and B219558 (the "*Iskowitz* appeal").

3. Georges Marciano filed two lawsuits in the Los Angeles County Superior Court in August 2007 and January 2008 commencing the *Fahs* and *Iskowitz* actions. Almost all of the defendants in both lawsuits filed cross-complaints for defamation and related claims, such as infliction of emotional distress. Based upon discovery sanctions, Mr. Marciano's complaints in both lawsuits were stricken; his answers to the cross-complaints were stricken; and his defaults on

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1 the cross-complaints were entered. In the *Fahs* action, five default judgments were entered in  
2 favor of the defendants in late July 2009, although they later were reduced to a total of \$205  
3 million. In the *Iskowitz* action, one default judgment totaling \$55 million was entered in August  
4 2009 in favor of the three defendants.

5 4. Prior counsel for Mr. Marciano sought a stay of the default judgments from the  
6 State Court pending appeal, but was denied the stay because he could not post a bond of 1-1/2  
7 times the \$260 million in default judgments. Thereafter, some of the judgment holders attempted  
8 to enforce their judgments for a period of approximately two months. I was involved in dealing  
9 with those judgment collection efforts against Mr. Marciano.

10 5. Mr. Marciano promptly appealed all of the default judgments on various grounds,  
11 including that (1) discovery sanctions were improper for many reasons; (2) the trial judge failed  
12 in multiple ways to fulfill her gate-keeping function in connection with the default judgment  
13 prove-up by, for example, allowing evidence of numerous statements not even alleged in the  
14 cross-complaints and then awarding damages based on those statements, awarding damages on  
15 conduct that was plainly privileged under California Civil Code § 47 and on causes of action  
16 barred by the applicable statute of limitations, and allowing in evidence known by the judge and  
17 the defendants' lawyers to be false; (3) the default judgments were excessive, especially when  
18 contrasted with judgments in cases presenting more compelling defamation claims; and (4) the  
19 judge denied Mr. Marciano due process by refusing to recuse herself despite name-calling and  
20 other statements by her showing demonstrable bias. These and other issues have been raised by  
21 Mr. Marciano in the briefs filed by him in the *Fahs* and *Iskowitz* appeals, which I was partially  
22 responsible for drafting.

23 6. Mr. Marciano's appellant's opening brief in the *Iskowitz* appeal was filed with the  
24 Court of Appeal on July 30, 2010. Mr. Marciano did not request an extension of time to file that  
25 brief, although he made a motion to extend the word limit from 14,000 to 19,000 words, which  
26 was granted on July 21, 2010. A copy of his opening brief was filed with this Court on August  
27 13, 2010, as an attachment to Mr. Marciano's supplement to his motion for reconsideration [dkt.  
28 no. 116], and as an exhibit to the declaration of Dean E. Dennis [dkt. no. 125] filed on September

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1 10, 2010, in opposition to the petitioning creditors' motion for summary judgment. Under  
2 California Rule of Court ("CRC") 8.212(a), the due date for respondents' opening brief in the  
3 *Iskowitz* appeal was 30 days later on August 29, 2010. On August 19, 2010, the respondents in  
4 that appeal filed a motion for a 60 day extension of time to file their respondents' brief. On  
5 August 23, 2010, Mr. Marciano filed an opposition due to Marciano's need to expeditiously  
6 pursue the appeal in light of the pending involuntary Chapter 11 case against him that is based  
7 upon the default judgments against him that are on appeal. On the same date the Court of Appeal  
8 issued an order extending the time to file the respondent's brief for 60 days to approximately  
9 October 29, 2010.

10 7. On October 26, 2010, the respondents in the *Iskowitz* appeal filed a motion for an  
11 additional extension, which Mr. Marciano opposed by opposition filed on October 28, 2010. On  
12 November 1, 2010, the Court of Appeal granted the respondents an additional 30 days to  
13 approximately November 28, 2010, and stating that no further extensions would be allowed  
14 respondents. That brought their total time to file a respondents' brief to 120 days. The  
15 respondents in the *Iskowitz* appeal then violated that deadline, which caused the Court of Appeal  
16 to send out a default notice on December 1, 2010, requiring them to file their brief within 15 days  
17 or have the appeal decided without their brief. Finally, on December 13, 2010, they filed their  
18 brief. Mr. Marciano obtained a short extension to file his reply brief due to the holidays, and his  
19 reply brief was filed on February 2, 2011.

20 8. In the *Fahs* appeal, Mr. Marciano's opening brief was lodged on October 10, 2010,  
21 with an application for leave to file an oversized brief. On October 29, 2010, the Court of Appeal  
22 granted the application, filed Mr. Marciano's opening brief and ordered that respondents' brief be  
23 filed on January 31, 2011 (a ninety day briefing schedule). After waiting for most of the 90 days  
24 given by the Court to them to file their respondents' brief, on January 20, 2011, the  
25 defendants/respondents in the *Fahs* appeal filed a motion by which they sought to delay the  
26 appeal by requesting that the Court of Appeal strike Mr. Marciano's opening brief and order  
27 seven court reporters to assemble one consecutively-numbered reporters' transcript, which the  
28 lead reporter previously refused to do in response to the request of my office in July 2010. Mr.



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1 Marciano opposed the respondents' motion, but the Court of Appeal granted it on February 7,  
2 2011. Once the consecutively numbered transcript is prepared, Mr. Marciano will need to re-file  
3 his opening brief with corrected page references and then the respondents' brief will be due in 30  
4 days.

5 9. On October 27, 2009, three petitioning creditors filed an involuntary Chapter 11  
6 petition against alleged debtor Georges Marciano. Those three creditors held three of the five  
7 default judgments that are the subject of the *Fahs* appeal.

8 10. On behalf of Mr. Marciano, I made a motion to dismiss the involuntary petition on  
9 grounds of insufficient process and lack of personal jurisdiction because he had been served by  
10 mail at a residence in Beverly Hills where he had not resided for almost three months and because  
11 he had not even resided in the United States for more than two months at the time of attempted  
12 service by mail. The motion was based on the grounds that a claim could not be stated  
13 because certain provisions of Chapter 11 applicable to individuals are unconstitutional. The  
14 motion was denied at hearing on January 13, 2010, by Judge Richard Neiter, who was sitting in  
15 for Judge Victoria Kaufman. [Dkt. no. 90.] I attended that hearing.

16 11. When Judge Kaufman returned from leave, she held a status conference on April  
17 8, 2010. I attended that status conference. Despite the Court's negative reaction at the initial  
18 status conference to the possibility of staying the involuntary bankruptcy case while the State  
19 Court appeals proceeded, on April 26, 2010, on behalf of Mr. Marciano filed a motion to suspend  
20 the involuntary Chapter 11 case under 11 U.S.C. § 305(a) on grounds that the case should be  
21 dismissed or stayed until the State Court appeals were resolved, rather than proceeding with an  
22 involuntary case filed by three petitioning creditors whose excessive default judgments were on  
23 appeal. [Dkt. no. 57.] That motion was denied by order entered on July 2, 2010, which is one of  
24 the orders on appeal. [Dkt. no. 102.]

25 12. Despite the Court's negative reaction to Mr. Marciano's desire to take discovery,  
26 on his behalf I propounded interrogatories, propounded document requests and noticed  
27 depositions shortly after the April 8, 2010 status conference, but the petitioning creditors refused  
28 to respond and to appear for deposition. On May 13, 2010, on behalf of Mr. Marciano I filed a



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1 motion for terminating sanctions or, alternatively, to compel discovery responses, the production  
2 of documents and depositions from the petitioning creditors [dkt. no. 68], which was granted in  
3 part at hearing on July 2, 2010. [Dkt. no. 101.] What was granted at that hearing, however, was  
4 taken away at hearing on July 15, 2010, when the Bankruptcy Court ordered that no discovery  
5 would occur in the case by any party until after the Court determined the summary judgment  
6 motions. [Dkt. no. 121.]

7 13. On July 8, 2010, on behalf of Mr. Marciano filed a motion for reconsideration of  
8 the Court's order denying his motion to suspend the case under 11 U.S.C. § 305(a). [Dkt. no.  
9 105.] The petitioning creditors' opposition was filed on September 17, 2010. [Dkt. no. 138.]  
10 Mr. Marciano's reply was filed a week later. [Dkt. no. 140.] The motion was not heard by the  
11 Court until December 2, 2010, when it was denied at the hearing that I attended, and the order  
12 was entered on December 29, 2010. [Dkt. no. 164.] That order also is on appeal.

13 14. On July 14, 2010, the petitioning creditors filed a motion for summary judgment  
14 and supporting papers [dkt. nos. 107-113], which Mr. Marciano opposed. [Dkt. nos. 122-127.]  
15 Mr. Marciano's opposition included a cross-motion for summary judgment. [*Id.*] That  
16 opposition was the first brief filed by Mr. Marciano in which he fully addressed whether the  
17 petitioning creditors claims were in bona fide dispute because they were based on default  
18 judgments that were on appeal, which should be reversed. The petitioning creditors' reply papers  
19 were filed on September 21, 2010. [Dkt. nos. 133-137.]

20 15. At hearing on October 1, 2010, the Court continued the hearing until October 28,  
21 2010, on the petitioning creditors' motion for summary judgment, Mr. Marciano's cross-motion  
22 for summary judgment, and Mr. Marciano's motion for reconsideration of the order denying his  
23 prior motion to dismiss or stay the case under 11 U.S.C. § 305(a). The Court ordered petitioning  
24 creditors and Mr. Marciano to file supplemental papers, which was done. [Dkt. no. 142, 144-150,  
25 151-155.]

26 16. On its own motion, the Court continued the October 28 hearing to December 2,  
27 2010.

28 17. At approximately 9:30 p.m. on December 1, 2010, the Court posted a 35 page

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1 tentative ruling on the matters scheduled for the next day. I was checking the tentative ruling  
2 throughout the day, and first saw it at approximately 10:00 p.m. on December 1. The next  
3 morning, I arrived at work early and spent approximately four hours carefully reading the ruling  
4 and preparing for the hearing, although I did not have time to read the legislative history  
5 surrounding the history cited in the tentative ruling and I did not have time to read any of the 11  
6 new cases cited in the tentative ruling, although I was able to briefly scan two of the cases.

7 18. On December 2, 2010, at 1:30 p.m., at hearing on the pending motions, I requested  
8 that the Court postpone the hearing for a short time to permit Mr. Marciano's counsel to review  
9 the new cases cited by the Court in the tentative ruling and the three citations to the legislative  
10 history, which also had not been previously cited by the parties. The Court declined that request  
11 and proceeded with the hearing.

12 19. In opposition to the petitioning creditors' summary judgment motion and at the  
13 December 2 hearing, on behalf of Mr. Marciano I also requested that the Court permit Mr.  
14 Marciano an opportunity to conduct discovery on the issues of whether the petitioning creditors'  
15 default judgments were in bona fide dispute and whether the involuntary petition had been filed in  
16 bad faith. The Court also denied that request.

17 20. At the conclusion of the December 2 hearing, the Court ruled that the petitioning  
18 creditors' motion for summary judgment was granted, Mr. Marciano's cross-motion for summary  
19 judgment was denied, and Mr. Marciano's motion for reconsideration of the order denying a stay  
20 of the involuntary case also was denied.

21 21. On December 28, 2010, the Court entered its "Order (1) Granting Petitioning  
22 Creditors' Motion for Summary Judgment for the Entry of an Order for Relief Under Chapter 11  
23 of Title 11 of the United States Code against Georges Marciano, and (2) Denying Georges  
24 Marciano's Cross-Motion for Summary Judgment" [dkt. no. 159] and also entered the related  
25 "Order for Relief in the Instant Title 11 Case Against Georges Marciano" [dkt. no. 161]  
26 (collectively, the "December 28 Orders").

27 22. On December 28, 2010, the Court also entered its 31-page Memorandum of  
28 Decision, which was consistent with its tentative ruling on December 1. [Dkt. no. 160.] Based

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1 upon my review of the December 28 Memorandum, the substantive changes to the tentative  
2 ruling found in the Memorandum appear to be (1) a brief discussion of the Bankruptcy Reform  
3 Act of 1978 at 11:19-12:13 regarding the removal of the requirement of petitioning creditors  
4 proving one of six specific "acts of bankruptcy"; (2) the addition of the citation to *In re*  
5 *Letourneau*, 422 B.R. 132, 138 (Bankr. N.D. Ill. 2010), at 12:16-19; and (3) the addition of the  
6 citation and quote of the Bankruptcy Commission Report at 14:12-17 regarding the "generally not  
7 paying" standard. There are other non-substantive changes consisting of minor changes in  
8 wording, the insertion of headings 1 to 7 at pages 15-24, and minor changes to citations, either  
9 adding or deleting the authorities referenced in the cited authorities.

10 23. On December 29, 2010, the Court entered its "Order Denying Motion for  
11 Reconsideration of Order Denying Motion to Dismiss or Stay Involuntary Chapter 11 Case."  
12 [Dkt. No. 164]. By that Order, it denied Mr. Marciano's motion for reconsideration of the Court's  
13 prior order denying his motion to stay the case under 11 U.S.C. § 305(a), which had been filed on  
14 July 8, 2010. [Dkt. no. 105.]

15 24. On December 29, 2010, on behalf of Mr. Marciano, I filed two documents. One  
16 was a motion for reconsideration of the Court's December 28 Orders granting petitioning  
17 creditors' motion for summary judgment, denying Mr. Marciano's cross-motion, and issuing an  
18 order for relief, and the related Memorandum of Decision. [Dkt. no. 162.] The second was an ex  
19 parte application for a 30-day temporary stay of the order for relief to allow the motion for  
20 reconsideration to be determined and, if denied, to allow a motion for stay pending appeal to be  
21 determined. [Dkt. no. 163.]

22 25. On January 6, 2011, on behalf of Mr. Marciano, I filed a motion for  
23 reconsideration [dkt. no. 171] regarding the Court's December 29, 2010 order [dkt. no. 164]  
24 denying his prior motion for reconsideration of the Court's order denying his motion to stay the  
25 case under 11 U.S.C. § 305(a).

26 26. Mr. Marciano's two motions for reconsideration were denied by orders entered on  
27 January 10, 2011. [Dkt. nos. 179 and 180.] The ex parte application for a temporary 30-day stay  
28 impliedly was ruled upon on January 24, 2011, as part of an order partially granting a similar

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1 motion, as described below.

2 27. On January 4, 2011, on behalf of Mr. Marciano, I filed a notice of appeal from the  
3 December 28 Orders; the related December 28 Memorandum of Decision; the December 29 order  
4 denying the July 8 motion for reconsideration; and four prior interlocutory orders that became  
5 subject to appeal upon entry of the order for relief. [Dkt. no. 169.] The appeal was referred to the  
6 BAP on January 5, 2011 [dkt. no. 170], and it has been docketed as BAP case no. 11-1008. Mr.  
7 Marciano's opening brief was due on February 22, 2011, and was filed on that date.

8 28. I understood that, under F.R.B.P. 8002(a), the appeal was premature given the  
9 pending motion for reconsideration of the Court's December 28, 2010 orders granting petitioning  
10 creditors' motion for summary judgment, denying Mr. Marciano's cross-motion, and issuing an  
11 order for relief, and the related Memorandum of Decision [dkt. no. 162] and his subsequently-  
12 filed motion for reconsideration regarding the Court's December 29, 2010 order [dkt. no. 164]  
13 denying his prior motion for reconsideration of the Court's order denying his motion to stay the  
14 case. Under Rule 8002(a), however, the appeal was effective immediately upon the denial of  
15 both motions for reconsideration on January 10, 2011.

16 29. On January 10, 2011, on behalf of Mr. Marciano, I filed an amended notice of  
17 appeal [dkt. no. 181] that added the two January 10, 2011 orders denying his two motions for  
18 reconsideration that were entered earlier that day.

19 30. On January 11, 2011, I filed an emergency motion requesting that the Court extend  
20 Mr. Marciano's time by 30 days to file his schedules, statement of financial affairs, etc., and to  
21 otherwise comply with applicable requirements. [Dkt. no. 182.] On January 11, 2011, the Court  
22 issued an order extending his time only 14 days until January 25, 2011. [Dkt. no. 185 in case no.  
23 09-39630.]

24 31. On January 11, 2011, on behalf of Mr. Marciano, I filed an emergency motion  
25 with the Bankruptcy Court by which he again requested that the Court issue a 30-day temporary  
26 stay of the December 28 Orders. The petitioning creditors filed an opposition on January 21.  
27 Later that day, I filed a supporting reply. By that motion Mr. Marciano also requested a  
28 suspension of the case under 11 U.S.C. § 305(a), now that the order for relief had been entered,

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1 and a stay pending appeal of the December 28 Orders. The motion was heard on January 24,  
2 2011. I attended the hearing. On January 25, 2011, the Bankruptcy Court issued a temporary  
3 stay to enable Mr. Marciano to seek a stay pending appeal from the Bankruptcy Appellate Panel  
4 or from the District Court, if the appeal was transferred there. [Docket no. 205.] By its terms, the  
5 stay was to expire upon the BAP entering its order denying the emergency stay motion on  
6 February 9, 2011. In granting the temporary 30-day stay, the Bankruptcy Court acknowledged  
7 the "unsettled" state of the law on issues of first impression, which are described below, but the  
8 Court declined to issue a stay of the December 28 Orders pending appeal pursuant to Rule 8005,  
9 choosing instead to leave that determination to the Bankruptcy Appellate Panel.

10 32. On January 25, 2011, the Bankruptcy Court also issued an order extending Mr.  
11 Marciano's time to file his schedules, statement of financial affairs and other documents required  
12 by applicable law until 7 days after the BAP denied a stay pending appeal. [Dkt. no. 203.] Given  
13 that the stay was denied by the BAP on February 9, the extended due date was February 16, 2011,  
14 unless the Ninth Circuit entered a stay pending appeal.

15 33. On January 27, 2011, on behalf of Mr. Marciano, I filed an emergency motion  
16 with the BAP by which he requested that the Court issue a stay of the December 28 Orders  
17 pending appeal. The petitioning creditors' opposition was filed on Friday, February 4, 2011. I  
18 filed a reply for Mr. Marciano in February 9, 2011. Within hours of the reply being filed on  
19 February 9, the BAP issued its order denying the emergency motion. Although I raised the issue  
20 of the Bankruptcy Court's loss of jurisdiction in the motion, the BAP did not comment on that.

21 34. On February 8, 2011, I filed a second amended notice of appeal with the  
22 Bankruptcy Court, which added the January 25 "Order Granting Temporary Stay, But Denying  
23 Stay Pending Appeal of (1) Order Granting Petitioning Creditors' Motion for Summary  
24 Judgment, and (2) Order for Relief" [docket no. 205], which was entered on January 25, 2011.

25 35. On February 10, 2011, I filed a notice of appeal of the BAP's February 9 order and  
26 then prepared the emergency motion for stay pending appeal to file with the Ninth Circuit. The  
27 BAP delayed in referring the appeal to the Ninth Circuit. As of February 16 – the extended due  
28 date for the filing of schedules and the statement of financial affairs and compliance with other



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1 applicable requirements – the appeal still had not been referred.

2 36. On the morning of February 16, my secretary and I both spoke to the BAP clerk  
3 (Patty) who is responsible for referring the appeals filed with the BAP to the Ninth Circuit,  
4 which was necessary so the appeal could be assigned a case number. She said she only works on  
5 Wednesdays to Fridays and that she had not been in to take care of it. I informed her that I was  
6 waiting for the matter to be referred so that I could file an emergency motion with the Ninth  
7 Circuit, and I asked her if she could get the appeal referred as soon as possible. She said she  
8 would take care of it as soon as she could get to it, perhaps that day or the next day.

9 37. The appeal finally was referred by the BAP to the Ninth Circuit on February 17,  
10 2011. When the case was assigned a number on February 18, I caused the emergency motion for  
11 a stay, the Appendix and a supporting declaration to be filed hours later on February 18 with the  
12 Ninth Circuit.

13 38. On February 24, 2011, the Ninth Circuit issued an order denying the stay motion  
14 filed with it. The order also ordered Mr. Marciano to file a response within 21 days showing that  
15 the Ninth Circuit had jurisdiction over the appeal, which its order stated it did not think it had. I  
16 will be filing the brief required by the Court and a renewed request that the Ninth Circuit issued  
17 stay pending appeal due to the fact that it does have jurisdiction over the appeal from the BAP's  
18 order denying a motion for stay pending appeal.

19 39. On March 1, 2011, certain creditors filed a motion for appointment of a Chapter 11  
20 trustee and a related application for order shortening time for hearing on the motion. [Dkt. no.  
21 213.] On March 2, 2011, the Court set the motion for hearing on March 4, 2011. [Dkt. no. 214.]  
22 The motion was joined by the U.S. Trustee and the petitioning creditors. Dkt. nos. 217 and 219.]  
23 Over Mr. Marciano's opposition [dkt. no. 218], the motion was granted at hearing on March 4,  
24 which I attended. On March 7, the Court entered its "Order Directing the Appointment of a  
25 Chapter 11 Trustee" [dkt. no. 221] (the "March 7 Order").

26 40. On March 8, 2011, Mr. Marciano filed an appeal from the March 7, 2011 Order.  
27 [Dkt. no. 222.]

28 The foregoing is within my personal knowledge. I declare under penalty of perjury of the

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1 laws of the United States of America that the foregoing is true and correct and that this  
2 declaration was executed on March 10, 2011.

3  
4 /s/ Daniel J. McCarthy  
5 Daniel J. McCarthy  
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## PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 300 S. Grand Avenue, 37th Floor, Los Angeles, California 90071

A true and correct copy of the foregoing document described **MOTION FOR TEMPORARY STAY AND FOR STAY PENDING APPEAL OF ORDER DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DANIEL J. McCARTHY** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner indicated below:

**I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On March 10, 2011, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

Bradley E Brook bbrook@bbrooklaw.com, jimmy@bbrooklaw.com; brookecfmail@gmail.com  
Peter A Davidson pdavidson@ecjlaw.com  
Dare Law dare.law@usdoj.gov  
Anthony J Rothman anthony@arothmanlaw.com  
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Ramesh Singh claims@recoverycorp.com  
United States Trustee (LA) ustpragion16.la.ecf@usdoj.gov  
☐ Service Information continued on attached page

### **II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL (Indicate method for each person or entity served):**

On \_\_\_\_\_, I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service Information continued on attached page

**III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (Indicate method for each person or entity served):** Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on March 10, 2011, I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on the judge will be completed no later than 24 hours after the document is filed.

The Honorable Victoria Kaufman (via personal delivery)  
Bradley E. Brook, via email at bbrook@bbrooklaw.com  
Peter A. Davidson, via email at pdavidson@ecjlaw.com  
Dare Law, U.S. Trustee's Office via email at dare.law@usdoj.gov

☐ Service Information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

March 10, 2011

Hae Jung Park

/s/ Hae Jung Park

Date

Type Name

Signature